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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1941

No. 255

WALTER CHAPLINSKY, APPELLANT,

vs.

STATE OF NEW HAMPSHIRE

APPEAL FROM THE SUPREME COURT OF THE STATE OF NEW HAMPSHIRE

FILED JULY 10, 1941.

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[fol. 1]

IN THE SUPERIOR COURT OF STRAFFORD COUNTY, STATE OF NEW HAMPSHIRE

No. 2119

STATE

vs.

WALTER CHAPLINSKY

Respondent's Bill of Exceptions

The respondent presents unto the court the following Bill of Exceptions:

STATEMENT OF THE CASE

This was a prosecution for an alleged violation of Chapter 378, Section 2, Page 1470 of the Public Laws of the State of New Hampshire—to wit: "No person shall address any offensive, derisive or annoying word to any other person who is lawfully in the street or other public place, nor call him by any offensive or derisive name, nor make any noise or exclamation in his presence and hearing with intent to deride, offend, or annoy him or prevent him from pursuing his lawful business or occupation." The complaint issued thereunder is as follows: "County of Strafford, aforesaid, with force and arms, in a certain public place in said city of Rochester, to wit, on the public sidewalk on the easterly side of Wakefield Street, near unto the entrance of the City Hall, did unlawfully repeat, the words following, addressed to the complainant, that is to say, 'You are a God damned racketeer' and 'a damned Fascist and the whole government of Rochester are Fascists or agents of Fascists' the same being offensive, derisive and annoying words and names. To the charge, the respondent pleaded not guilty, and on trial by jury, on September 16, 1940, a verdict of guilty was returned.

[fol. 2] Before the trial, the defendant filed the following Motions to Dismiss and to Quash, both being the same in form and in substance, to wit:

MOTION TO QUASH (AND/OR DISMISS)

Now comes the defendant in the above matter and moves that this action against him be quashed (and/or dismissed) on and for the following grounds:

1. That the Public Law under which this arrest was made is invalid and void by reason that it is directly contrary to the First Amendment of the Constitution of the United States, for it places an unreasonable restraint on the freedom of speech, the freedom of the press, and the freedom of worship.

2. That the Public Law under which this arrest was made is invalid and void by reason that it violates the Fourteenth Amendment of the Constitution of the United States, which Amendment had the effect of making said First Amendment applicable to the States, for it places an unreasonable restraint on the freedom of speech, freedom of the press, and freedom of worship.

3. That the Public Law under which this arrest was made is invalid and void by reason that it violates Article Six, Clause Two, of the Constitution of the United States.

Wherefore, the defendant prays this Honorable Court to quash (and/or dismiss) this action and that he be discharged.

By his Attorney, Alfred A. Albert.

Both of these motions were denied and the defendant seasonably objected and took exceptions.

The respondent seasonably objected and took exception to the denial of his renewed motions to quash and to dismiss which were made at the conclusion of the State's evidence.

The respondent seasonably objected and took exception to the exclusion of certain opening remarks and certain evidence as is shown by the record.

The respondent seasonably objected and took exception to the denial of his renewed motions to dismiss and to quash, at the close of the evidence. At this point, the defendant argued that the Statute and the Complaint which issued thereunder was unconstitutional and void on its face by [fol. 3] reason that it constituted an unreasonable restraint upon the freedom of speech, the freedom of the press, and the freedom of worship in contravention of the First and Fourteenth Amendments to the United States Constitution, on the grounds that the Statute was so broad in its terminology and so vague and indefinite that it set no reasonable standard of criminal responsibility and that, therefore, any complaint which may issue under it was invalid and void.

The defendant further argued that the Statute and Complaint cited supra was in violation of Article Six, Clause 2, of the United States Constitution, in that it was contrary to the Supreme Law of the land.

The respondent seasonably objected and took exception to the denial of the defendant's motion for a directed verdict, to wit:

DEFENDANT'S MOTION FOR A DIRECTED VERDICT

The defendant respectfully moves this Honorable Court to direct a verdict of not guilty on and for the following reasons:

1. That the weight of all the evidence taken in its most unfavorable light to the defendant fails to constitute a violation of Public Laws of New Hampshire, Chapter 378, Section 2, Page 1470, a violation of which the defendant is charged.

2. That the Public Law under which this complaint was issued is invalid and void by reason that it is directly contrary to the First Amendment of the Constitution of the United States, for it places an unreasonable restriction and restraint upon the Freedom of Speech, the Freedom of the press, and the Freedom of worship.

3. That the Public Law under which this complaint was issued is invalid and void by reason that it violates the Fourteenth Amendment of the Constitution of the United States, which Amendment had the effect of making said First Amendment applicable to the States for it places an unreasonable restriction and restraint upon the Freedom of speech, the Freedom of the press, and the Freedom of worship.

4. That the Public Law under which this complaint was issued is invalid and void by reason that it violates Article Six, Clause Two, of the Constitution of the United States.

[fol. 4] 5. (This was made orally) That the words charged are not derisive, offensive or annoying within the terms of the Statute and constitute no offense at law.

By his Attorney, Alfred A. Albert.

This Bill of Exceptions and the memo of evidence is to be printed and appended hereto.

And now that justice may be done, the respondent requests that this, his Bill of Exceptions, be allowed and the same transferred to the Supreme Court for judicial determination of the questions of law raised herein.

Walter Chaplinsky, by Alfred A. Albert, *Attorney for Respondent.*

The foregoing Bill of Exceptions is hereby allowed and questions of law hereby raised may be transferred to the Supreme Court.

Henri A. Burque, *Presiding Justice.*

Dated at Exeter this 13th day of November, 1940.

Trial before Hon. Henri A. Burque, P. J., and Jury at Dover, New Hampshire, September 16, 1940.

Jury impanelled.
Plea: Not Guilty.

STATE'S OPENING STATEMENT BY MR. BEAMIS:

May it please the Court, Mr. Foreman and gentlemen of the jury. You have heard the complaint read to you stating the charge against the defendant Walter Chaplinsky. The [fol. 5] State will introduce evidence to prove to you, Mr. Foreman and gentlemen, beyond a reasonable doubt that the defendant is guilty as charged. There will be evidence from competent witnesses that on the 6th day of April last along in the middle part of the afternoon at Rochester and that this was a Saturday afternoon the defendant addressed to James Bowering, Jr., of Rochester, the following offensive, annoying and derisive words: "You're a God damned racketeer, a damned Fascist and the whole government of Rochester are Fascists." The State will prove beyond a reasonable doubt that these words were addressed to James Bowering, that they were annoying and offensive and that they were addressed to James Bowering in a public place in the City of Rochester on a public street on Wakefield Street, on the east side of Wakefield Street in the vicinity of the City Hall.

GERALD G. LAPIERRE. Mr. Lapierre, called by State, being duly sworn, testified as follows:

By Mr. Beamis:

Q. Will you state your full name please?
A. Gerald G. Lapierre.
Q. Where do you live, Mr. Lapierre?
A. In Rochester.
Q. Are you a police officer in Rochester?
A. Yes.
Q. How long have you lived in Rochester?
A. All my life.
Q. About how many years is that?
A. Twenty-six years.
Q. Calling your attention to April the 6th last, Mr. Lapierre, were you on duty as a police officer that day?
A. I was.
Q. All day?
A. Yes I started at one in the afternoon.
Q. And whereabouts were you stationed?
A. On Central Square.
Q. And were you there all afternoon?
A. Yes.
Q. What were the nature of your duties most of the time?
A. Traffic, mostly traffic duty.
Q. Some time during the afternoon, Mr. Lapierre, did something out of the ordinary occur there in the square?
A. Yes.
Q. Will you state what that was?
A. Well I was busy directing traffic and a crowd gathered on the corner of North Main and Central Square and I went over and investigated and found this man with his knee on the ground side of an automobile leaning on the bumper of an automobile.
Q. Then what did you do?
A. I picked him up and started to bring him to the station.
Q. That man that you saw near the automobile, is he here in Court this afternoon?
A. Yes.
Q. Will you point him out please?
A. The man right there.

Q. Over here, the man with the glasses? (Referring to [fol. 6] the respondent)

A. That's right.

Q. Now you said you started for the police station?

A. Yes.

Q. And which direction from the Square was that, what was the name of the street towards the police station?

A. Wakefield Street.

Q. Did you go to the police station with him?

A. Yes.

Q. Did anything happen on the way up to the police station?

A. Yes.

Q. You tell us what that was.

A. Well we met Marshal Bowering and Ralph Dunlap and Lyman Plummer and several others and Marshal Bowering told this man that he'd warned him that the crowd was pretty sore and he told him, he called Marshal Bowering a God-damned racketeer and a damned Fascist and that the whole city government of Rochester were Fascists or agents of Fascists.

Q. You say this took place when you met the Marshal on your way up to the station?

A. On the way up to the station.

Q. Just about where in the street did this happen?

A. On the sidewalk on Wakefield Street in front of City Hall.

Q. Now this commotion that you first noticed you said you saw took place on what corner in the Square?

A. On a corner of North Main and Central Square.

Q. Is that anywheres near the Scenic Theatre?

A. Yes, directly opposite the Scenic Theatre.

Q. Did you tell this man that you took along with you you were going to arrest him?

A. No.

Mr. Albert: Your Honor please, I can't hear the County Solicitor very clearly. I wish you'd speak a little louder some way.

By Mr. Beamis:

Q. Where in the street did this conversation take place between the Marshal and Mr. Chaplinsky?

A. On the sidewalk on Wakefield Street.

Q. You said you lived in Rochester for twenty-six years?

A. Yes.

Q. Is Wakefield Street a public highway and been used as such by the public as far as you know during that period of time?

A. As far as I know.

Mr. Beamis: You may inquire.

Cross-examination.

By Mr. Albert:

Q. Officer, can you tell the Court and the jury the approximate distance from where you were stationed directing traffic to the spot where you picked up the defendant?

A. I don't know.

Q. Can't you give us some idea? You are stationed there as a traffic officer, I should think you'd know the distance.

A. Well I was in the middle of the street in front of the Scenic, on the Scenic crossing and that happened near a rubbish can on Central Square.

Q. That doesn't tell me just what distance that was.

[fol. 7] A. I don't know what distance it is.

Q. Can you show me by indicating in the courtroom the length of the floor perhaps? You have no idea then, officer, what distance you were away from the defendant at the time you went to pick him up?

A. Well perhaps the length of this room.

Q. Approximately the length of this room. At the time you first saw the defendant can you give me the approximate number of people that there were around the defendant?

A. I couldn't give you that.

Q. Could you tell me whether there was any crowd around the defendant?

A. Yes.

Q. Could you tell me whether it was large or small?

A. There was a large crowd.

Q. Previous to the time you went over to pick up the defendant did you notice any gathering or group on that particular spot?

A. No.

Q. Did you notice whether or not Marshal Bowering was there previous to the time that you picked up the defendant?

A. No.

Q. Did you notice whether or not there was any excitement or noise or disturbance previous to the time that you picked up the defendant?

A. Well, the defendant was selling these papers I think.

Q. Yes. Did you notice any disturbance or noise?

A. No.

Q. Was the defendant creating any disturbance or noise? Can you answer that question?

A. Well, no.

Q. How do you know that he was selling magazines or pamphlets if you didn't look over there previous to the time that you picked him up?

A. Well I saw him over there.

Q. I just asked you before whether or not you noticed there was a crowd or mob there or any kind of a gathering.

A. Well there were people on the street.

Q. And you said to that "No." Isn't that correct?

A. No.

Q. Officer, just from the point that you were stationed directing traffic, previous to the time that you saw the defendant on the ground and went over to pick him up, you saw the defendant selling magazines or doing something. Is that correct?

A. That's right.

Q. At that time did you notice whether or not there was any gathering around the defendant?

A. No.

Q. You did not notice that?

A. No.

Q. When you saw the defendant on the ground what did you do?

A. I helped him up and started to walk to the police station with him.

Q. At that time when you picked him up was Marshal Bowering there?

A. No.

Q. Approximately how far from the spot that you picked up the defendant did you meet Marshal Bowering?

A. How far? Will you repeat that question?

Q. Approximately how far from the spot that you picked up the defendant did you meet Marshal Bowering and Deputy Sheriff Dunlap?

A. Oh fifty yards.

[fol. 8] Q. Approximately fifty yards. When you first met Marshal Bowering and the Deputy Sheriff did you say anything to them?

A. No.

Q. Did you hear either Dunlap or Marshal Bowering say anything to the defendant?

A. Yes.

Q. What was that?

A. Marshal Bowering said that he had previously warned him that the people were getting sore.

Q. Just that, about that word.

A. Mr. Bowering——

Q. Did the defendant make any answer to that?

A. Yes.

Q. Are you sure that that is all that Marshal Bowering said at that time?

A. As far as I can remember.

Q. Did Deputy Sheriff Dunlap say anything at that time?

A. No.

Q. Did they do anything?

A. No.

Q. Did they grab hold of the defendant in any way?

A. No. I had hold of the defendant.

Q. Was there anyone with you holding him?

A. Yes at the time.

Q. Who was that?

A. Burt Powers, he's an officer.

Q. Another officer by the name of Burt Powers?

A. Yes.

Q. Did Officer Powers say anything to either Marshal Bowering or Dunlap?

A. No.

Q. Did Marshal Bowering or Dunlap say anything to Officer Powers?

A. No.

Q. Did Officer Powers say anything to the defendant?

A. No.

Q. Did either Marshal Bowering or Deputy Sheriff Dunlap address the defendant in a loud tone?

A. No.

Q. There was nothing as far as you observed exciting in the manner of either the Marshal or the Deputy Sheriff?

A. No.

Q. Was there anything exciting in the manner of the defendant at that point?

A. No.

Q. Would you say that he was in an excitable mood?

A. Well perhaps he was.

Q. Will you answer that question yes or no please?

A. I can't answer it yes or no.

Q. You don't know. At the point that you met Marshal Bowering and the Deputy Sheriff, from that point where did you go?

A. Repeat that please.

Q. From the point that you met Marshal Bowering and the Deputy Sheriff where did you go?

A. Into the police station.

Q. Did you take the defendant with you?

A. Yes.

Q. What happened there?

A. I don't remember.

Q. Were you with the defendant at all times while he was in the police station?

A. No.

Q. Where did you bring him when you got to the police station?

A. To the Marshal's office.

Q. Did you leave him there?

A. Yes.

Q. Where did you go from there?

A. Out in the hall.

Q. And from there?

A. Went back in there.

Q. When you went back into the office can you tell this Court what occurred there, if anything?

A. I don't remember anything that happened.

Q. You don't remember anything that happened in that room. Officer, let's get back to the point on Wakefield Street where you and the officer that was with you are tak-[fol. 9] ing the defendant to the police station. And you meet Marshal Bowering and the Deputy Sheriff. Will you kindly repeat the words that you say that you heard the defendant say?

A. He called the Marshal a God-damned racketeer, a damn Fascist and that the whole city government of Rochester were Fascists or agents of Fascists.

Q. And did you say that the defendant was not in an excitable mood at the time you met Dunlap and Bowering?

A. I said I didn't know.

Q. You didn't know. Are you saying now that for no reason at all that you know of that the defendant made these statements?

A. Repeat that please.

Q. Are you saying as far as you know that for no reason whatsoever did the defendant make these statements?

A. None that I know of.

Mr. Albert: That's all.

Redirect examination.

By Mr. Beamis:

Q. About what time in the afternoon did all this take place, do you remember approximately?

A. Approximately 3:30.

Mr. Beamis: That's all.

James Bowering, Jr. Mr. Bowering called by State, being duly sworn, testified as follows:

By Mr. Beamis:

Q. Will you state your full name please?

A. James Bowering, Jr.

Q. Where do you live?

A. Rochester.

Q. What is your occupation?

A. City Marshal.

Q. How long have you lived in Rochester, Mr. Bowering?

A. About twenty-five years.

Q. Calling your attention to April the 6th last were you on duty that day?

A. I was, yes.

Q. All day?

A. All day from seven in the morning until six in the evening.

Q. Some time during the afternoon of that day did you have an occasion to come down to the Square?

A. Yes I did. I had several complaints.

Q. About what time in the afternoon?

A: Well it was I should say around one-thirty, two o'clock possibly. I am not sure what time but several people came in.

Q. Were you down in the Square more than once that afternoon?

A. I was on the Square once or twice in the afternoon.

Q. And then where did you go from there?

A. I went back to the office.

Q. Was your attention called to some occurrence in the [fol. 10] Square one time during the afternoon while you were in the police station?

A. Yes.

Q. What did you do?

A. Man came by in the car, drove up, yelled out there was a riot on the Square, you better get out there.

Q. What did you do?

A. I immediately made the front door and headed for the square.

Q. Was there anybody with you?

A. Yes sir, there were several people in the room at the time. There was Deputy Sheriff Dunlap and Deputy Sheriff Plummer, Officer Nickerson and special officer Stetson and one or two other men, I don't remember who.

Q. Did you get to the square that time?

A. No we got merely to the sidewalk in front of the City Building.

Q. What happened there?

A. We met Officer Lapierre and Power coming back with the respondent here, Mr. Chaplinsky.

Q. Did you have some conversation with them?

A. Yes.

Q. With Mr. Chaplinsky.

A. I told him that I previously warned that the crowd were in an ugly mood. I knew that because of the complaints that came in. I warned him if you keep it up, I had earlier in the afternoon, that the crowd might get out of hand, and I reminded him of that when I picked him up.

Q. What happened then?

A. Then he opened up on me, called me a God-damned racketeer, a damn Fascist, said all the city officials of Rochester were Fascists or agents of Fascists.

Q. Those remarks that you made to him at that time were all that you made?

A. No. I said, "That's about enough, you're under arrest now."

Q. Then what did you do?

A. I took him inside in my office, took his name, address and his description, fingerprinted him and then locked him up.

Q. Now will you state just where on Wakefield Street this thing occurred?

A. It occurred directly in front of the City Hall, not quite in front of the main entrance but a little down towards Central Square but on the sidewalk in front of the City Building. That's on the north side of that Sturtevant Court that runs in beside to the left.

Q. That sidewalk is part of the highway, is it?

A. Oh yes.

Q. How far is it from where you met the defendant and Officer Lapierre and Officer Power down to the square?

A. Well it is a matter of judgment, I have never measured it, but I should say, my figure is a little different than Officer Lapierre, I should say it is probably a hundred and twenty-five yards at least.

Q. What was the condition of traffic at that time?

A. Traffic was very heavy. Saturday afternoon is our worst day and that is the worst spot we have. That is the Scenic——

[fol. 11] Q. Has this part of Wakefield Street where this occurrence happened to your knowledge been used as a public highway for more than twenty years?

A. Yes, sir.

Mr. Beamis: You may inquire.

Cross-examination.

By Mr. Albert:

Q. Marshal Bowering, how long have you known the defendant?

A. That practically was the first meeting I had with him. He may have been in town and I have known him before, I am not certain of that, but that day was the first time I knew him and knew who he was. I have seen him on the street I believe before.

Q. Had you ever spoken to him before?

A. Before he was arrested?

Q. No, before that afternoon?

A. I may have. I'm not certain of that.

Q. You say that you took one or two trips to the square that afternoon?

A. Yes.

Q. Do you know whether you took one or two?

A. I know I took one, I'm not certain of the second trip.

Q. Well, on this trip that you talk about, is this the trip that you met the defendant, Officer Lapierre and the other officer?

A. I met the defendant Mr. Chaplinsky on the square. I didn't know his name at that time but I met him on the square. Officer Lapierre was directing traffic at the time but we had no conference together. I did speak to Mr. Chaplinsky.

Q. That is sufficient. At the time that you met Mr. Chaplinsky on the square this is the time previous to the time you met him with the two officers, what was he doing?

A. He was selling pamphlets or distributing, one or the other.

Q. All right. Were there many people around him?

A. In the immediate vicinity, no.

Q. Did you notice anybody watching him?

A. Yes there were several people at a distance.

Q. How far would you say they were away from Walter Chaplinsky?

A. Well it was a busy afternoon and this is all merely guesswork on my part. There was people, Saturday afternoon is a heavy shopping time.

Q. Answer the question. How far away would you say they were at the time you first saw Walter Chaplinsky?

A. How many of them?

Q. You said you saw several people that were——

A. Yes sir, passing directly back and forth all day long.

Q. They were not standing?

A. One or two possibly but I wasn't interested in the number there.

Q. Can you tell me this? Can you tell me the distance from the point where Officer Lapierre usually stands directing traffic to the point where he says the defendant was [fol. 12] picked up or to the point where you saw the defendant standing that first time?

A. Well it's not a very long distance, it's possibly fifty feet.

Q. Fifty feet?

A. Forty or fifty feet.

Q. What prompted you to say to Walter Chaplinsky when you first met him with the two officers that the people around here are getting sore, or words to that effect?

A. I beg your pardon, I didn't say there were two officers, I distinctly said there were not two officers, I said Officer Lapierre was directing traffic on the street.

Q. You're not following me. I am now at the point where on this second trip down to the square you met Officer Lapierre and the other one with Walter Chaplinsky.

A. I beg pardon.

Q. What I want to know is what prompted you to say to the defendant that the people around here are quite sore, or words to that effect?

A. I had possibly fifty or more of either telephone calls or personal complaints from people that there was a man on the street decrying the Catholic religion, calling the police racketeers, I mean the priests racketeers, saying that all religion was a racket and they wanted to know if I could do something about it.

Q. What did you say?

A. I said as far as I am concerned so long as he is doing that there is nothing I can do.

Q. How did you know there was nothing you could do?

A. I asked because I had so many complaints I went to the City Solicitor and I asked him is there anything I can do to prevent this. He said on religious grounds there is absolutely nothing you can do.

Q. Therefore, I take it you knew through the number of complaints you were receiving that there might be trouble?

A. Absolutely.

Q. And when you went down when you were going down this second time did you go down there to prevent any trouble, did you have that in mind?

A. The second time I went out I went to get out to the street. The second time as far as the time I mentioned was the time I left the building on the riot call. I went down there to see if we could quell it if there was one.

Q. And you met the defendant coming back?

A. Yes.

Q. Do you know a man by the name of Mr. Downing?

A. I know of him, yes.

Q. Was he with you on that day?

A. I don't know for sure.

Q. You don't recall. Do you know whether or not this Mr. Downing went with you the first time you went down to the square?

A. I don't know who you're referring to. There was a man on the square when I went to speak to Mr. Chaplinsky the first time I went down to giv him this warning I am talking about there was a man there at that time. Whether his name was Downing or something else I don't know.

Q. You state you went down the square the first time to [fol. 13] give a warning to the defendant?

A. Yes. I said that before.

Q. You expected trouble apparently?

A. Absolutely.

Q. And so after giving a warning to the defendant you decided well that's your duty, you're going back to the police station?

A. I had all my officers that I had available out on the streets.

Q. So you went back to the police station?

A. Absolutely. Someone has to be in the office.

Q. While you were talking to the defendant the first time you saw him did you see anybody strike him?

A. No, sir

Q. Didn't you see a man carrying the American flag using it as a weapon to strike the defendant?

A. No sir.

Q. Did you notice any disturbance at that time?

A. Yes. The first time I went down, yes.

Q. You just stated to me that there must be an officer on duty at all times in the police station?

A. Yes.

Q. You went down that time and left the office alone?

A. Oh no, I didn't say that. Beg pardon.

Q. Did you leave the office alone?

A. I left the office with one man, Officer Power there.

Q. Didn't you state all the available officers were out on duty?

A. That's right. I also said——

Q Is Officer Powers the same gentleman that Officer Lapierre referred to?

A. It is.

Q. When you came back from this first trip to the police station was Officer Powers there?

A. Police station?

Q. Yes.

A. I am not certain, he either was there or he came in shortly after.

Q. Didn't you state when you went out on this trip that you left Officer Powers there in the station?

A. Yes sir.

Q. When you came back you don't know whether he was there?

A. I said he was either there or came in shortly after. He might have been in the hall, I don't know.

Q. Then what did he do?

A. He left.

Q. He left and that's all you know about him. I take you back to the first time that you went down to warn the defendant. Did you direct any of your officers, any of the men on the force towards this particular area because you expected trouble?

A. Yes sir.

Q. Whom did you direct?

A. All the boys that were on the street, there was only two of them, we were short-handed.

Q. What were their names?

A. Lapierre and Powers.

Q. Lapierre's duty was to watch that corner as well as direct traffic?

A. His first duty was to direct traffic.

Q. Yes but you told him to keep an eye on this corner?

A. Yes sir.

Q. Tell me, do you know a man by the name of Bowman?

A. Know of him, yes.

Q. Was he with you on that day?

A. He may have been. I don't know, I have heard of them.

Q. Bowman and who?

A. Downing and the other man you mentioned.

Q. You don't know, do you, whether or not either one of [fol. 14] these people were with you at the time you went down to see the defendant the first time?

A. I don't know that.

Q. Did you see them there in that vicinity the first time?

A. I saw Bowman or Downing, one or the other of them, I get them mixed up, on the street that afternoon.

Q. Marshal Bowering, when you went down to see Walter Chaplinsky the first time wasn't there a man standing beside him threatening him?

A. He came up while I was talking.

Q. What did he say to the defendant?

A. He asked him if he believed in saluting the flag.

Q. What did he say?

A. He said absolutely not, the only flag I salute——

Court: No, not that.

Witness: He said I don't recognize any flag, Jehovah——

By Mr. Albert:

Q. Did this man that came up while you were standing assault or rather attack the defendant in any way?

A. You might call it that if you want to stretch a point.

Q. I might. What did he do?

A. He reached over and got hold of his coat collar like this and he said, "Do you believe in saluting the flag," then I pushed him back and told him go on and mind his own business, I didn't want any riot.

Q. Are you quite sure all he did was grab him by the coat?

A. Absolutely.

Q. Are you quite sure all he did was grab him by the neck?

A. Yes.

Q. Are you quite sure he didn't call him a son of a bitch?

A. Yes.

Q. Did the defendant ask you to arrest this man?

A. Yes.

Q. What did he say?

A. After he started off he said, "Why didn't you arrest that man?"

Q. After who started off?

A. The man that was standing on the corner.

Q. What did you say?

A. I said it is not necessary.

Q. Didn't you consider that a violation of the law?

A. No.

Q. In other words, people in the town that you are Marshal of can go around grabbing people by the coat collars and you don't consider that an offense, do you?

A. I do in some cases if it is necessary to make an arrest.

Q. I am asking whether or not that is an offense?

A. No.

Q. It is not an offense?

A. Not to me.

Q. So after this man went away and the defendant asked you to arrest him you didn't do anything about it?

A. No.

Q. You let him go. And what happened from there on?

A. Everything quieted down apparently, he went on selling his pamphlets, I went back to the office.

Q. Right after that incident wasn't there a gathering of people around there?

A. If so, it wasn't in my sight.

Q. Didn't you notice anybody gathering around the defendant at the time?

A. No sir.

Q. From there you went back to the police station. Is that right?

A. That is right.

Q. Assuming that everything was under order. Did you [fol. 15] give any warning to the defendant at that time?

A. Yes that's the time I warned him. It was two times I met him.

Q. What did you say to him?

A. I said the people are in an ugly mood, I asked him why it wasn't possible for him to preach his religion without riling the people up so, taking religion and jamming it down their throats, calling them racketeers and so on and priests racketeers. He said we preach our religion the way we want. I said that is all right, it is going to get the public in an ugly mood.

Q. You said the public was in an ugly mood?

A. I knew they were from the complaints I received.

Q. You knew that the public was in an ugly mood from the complaints you received. Knowing that the public was in an ugly mood you left the defendant standing on that corner and walked away assuming that everything was serene?

A. It was when I left.

Q. It was when you left, yet you knew that the public was in an ugly mood?

A. Oh yes.

Q. Didn't you fear that any danger might come to this defendant?

A. Possibly, yes.

Q. You thought everything was smooth and you walked away?

A. Yes sir.

Q. Went back to the police station and you got a riot call and you went out and met this particular defendant coming back with two officers?

A. That's right.

Q. When you first met these three men walking back, the defendant and the two officers, did any of those three men say anything to you?

A. Only the defendant. Probably they may have made some other remark but it hasn't stuck in my mind.

Q. What did the defendant say to you?

A. He repeated those words.

Q. Are those the same words you referred to before?

A. Yes sir.

Q. He said that to you without you saying anything to him?

A. Oh no.

Q. Let me hear what you said to him.

A. I reminded him, I told you the crowd were in an ugly mood and to go a little easy on your preaching there and to do it a little easier so the public wouldn't get too riled up and now you see what happened, words to that effect.

Q. Did he retort with the language of the complaint?

A. Yes sir and——

Q. Are you sure about the wording of that language?

A. Yes sir.

Q. You are absolutely certain?

A. Absolutely sure.

Q. You are certain that you have every word in the complaint that the defendant said at that time?

A. That was quite a long statement. May be slight difference but as far as the main charge I have made they are absolutely correct.

Q. Are you sure that the defendant said "You are a God damn Fascist and a racketeer"?

A. No he said "You're a God damn racketeer and Fascist" or damn Fascist, one or the other. Racketeer was first.

[fol. 16] Are you absolutely certain that he used the word "God"?

A. Absolutely.

Q. And you're sure about the position of these words, "God damn Fascist"?

A. No, he said racketeer first and then Fascist, and afterwards he said the city officials were Fascists or agents of Fascists.

Q. Did you do anything that may have caused or provoked the defendant to say what he did?

A. Not that I know of.

Mr. Beamis: I object.

Court: Overruled.

By Mr. Albert:

Q. Answer the question.

A. I say not that I know of.

Q. Did you speak to him in a loud tone?

A. No not louder than necessary.

Q. Did any of the others that were present there speak in a loud tone?

A. I didn't hear them talk to him at all.

Q. The other two men that were with you said nothing, that is, Lapierre and——

A. They may have but it was mere conversation, I didn't pay any attention to it.

Mr. Albert: That's all.

Mr. Beamis: That's all.

RALPH W. DUNLAP. Mr. Dunlap, called by State, being duly sworn, testified as follows:

By Mr. Beamis:

Q. Will you state your full name?

A. Ralph W. Dunlap.

Q. Where do you live?

A. Rochester, New Hampshire.

Q. How long have you lived in Rochester?

A. Forty-four years.

Q. Are you a Deputy Sheriff in this county?

A. I am.

Q. Calling your attention to April 6 last whether or not you were some time in the police station?

A. I was.

Q. On the afternoon of that day?

A. Yes sir.

Q. Did you accompany Marshal Bowering from the police station?

A. Yes sir.

Q. Started down towards the square?

A. Yes sir.

Q. Will you state whether or not he met anyone on the way down?

A. Soon after we left the walk-way, got on the sidewalk we met Officer Lapierre and Office Powers and they had with them the respondent Walter Chaplinsky.

Q. Was there any conversation?

A. Yes sir. The Marshal said something to this effect, I told you you'd, something would happen, I warned you that the people were getting upset, and he might have said a little more but nothing that I can remember.

Q. Was any reply made to that statement?

A. Yes, sir.

Q. Who made the reply?

A. Mr. Chaplinsky.

Q. You tell the Court and jury what he said.

A. He said, he called Marshal Bowering a God damned [fol. 17] racketeer, a damned Fascist and said the whole of the city government were Fascists or agents of Fascists.

Q. What happened after that?

A. The Marshal arrested him, took him into the station.

Mr. Beamis: That's all.

Cross-examination.

By Mr. Albert:

Q. You're a Deputy Sheriff, Mr. Dunlap?

A. That's right.

Q. How long have you known the defendant?

A. That was the first day I ever saw him.

Q. Was that the first time during this day you saw him?

A. Oh no, I'd seen him several times during the day.

Q. Can you tell me when during this day you saw him previously, do you know?

A. Yes. I saw him before dinner and I saw him again after dinner.

Q. Where did you see him?

A. Walking up and down Main Street on the right hand side going north by the Dodge Block and Penney's Store.

Q. Was this before dinner?

A. Both before and after.

Q. After dinner did you see the defendant standing on the particular corner in Central Square already mentioned?

A. He walked back and forth more or less.

Q. Did you see him standing in that particular corner that I speak of?

A. What particular corner are you referring to?

Q. Central Square as testified to opposite the theatre?

A. I saw him standing there but not for long.

Q. You saw him standing there?

A. That's right.

Q. Did you see any crowd or a gathering around the defendant at that time?

A. Not in the immediate vicinity, no sir.

Q. Did you notice whether or not there were any men lined up against the wall which was in back of the defendant, if I may put it that way, who were standing there watching him?

A. To answer that question I would have to elaborate a little bit if I may.

Q. Go ahead.

A. There were people lined up against that wall and there would have been whether Walter Chaplinsky was there or not. There always is a crowd lined up against that wall.

Q. On this particular day this particular time there were a group of people lined up against that wall?

A. Yes sir, as usual.

Q. Can you tell me whether the majority of them consisted of male or female?

A. It always is male.

Q. After you saw the defendant at this time what did you do?

A. I walked along.

Q. Were to?

A. Well most anywhere around the square. I have occasion to visit the different attorneys' offices.

Q. I bring you now down to the approximately three or three-thirty p. m. when the defendant was standing in the [fol. 18] square. Were you in the vicinity of that square at that spot at the time?

A. You will have to be a little more specific. You say three or three-thirty.

Q. Between the hours of three and three-thirty p. m.

A. Well between that time I passed that point, yes sir.

Q. At that time did you notice any gathering or crowd of people around the defendant?

A. No sir.

Q. Did you see Marshal Bowering talking to the defendant at that time?

A. When I saw Marshal Bowering he had finished talking with the defendant.

Q. How do you know?

A. Because he walked away.

Q. And you saw him talking to the defendant?

A. I didn't say that.

Q. You said that he had finished talking to the defendant?

A. If he talked with Chaplinsky he was finished.

Q. You didn't see him talking with Chaplinsky, did you?

A. No I didn't see him talking with Chaplinsky.

Q. You then walked away with Marshal Bowering?

A. I walked off in the same direction he did right after him.

Q. Were you walking along beside of each other?

A. No we weren't.

Q. Where were you going?

A. Well I was going to the same place he was going, to the station.

Q. At the time that you first met Marshal Bowering, the time you have just testified to, did you see anyone strike the defendant?

A. No sir.

Q. Did you see anyone rush at the defendant?

A. No sir.

Q. With a flag?

A. No sir.

Q. Did you hear anyone address the defendant with profanity?

A. No sir.

Q. When was the next time that you saw the defendant?

A. When I left the police station in company with Marshal Bowering and Deputy Sheriff Plummer and started for the square because we had a riot call.

Q. And you met up with the defendant and two others?

A. That's right.

Q. What did you do then?

A. Turned around and went back with them, we found the riot was all over.

Q. Went back into the police station and then what did you do?

A. I had nothing to do. It wasn't in my hands.

Q. Were you in the room with the Marshal and with the defendant when he was being questioned?

A. If you call it questioning, yes. He was doing most of the questioning himself.

Q. He was doing what?

A. He was doing most of it himself, as usual.

Q. Were you there the whole time that he was there?

A. I believe so. I might have stepped out for a few moments.

Q. Can you tell the Court what took place in that room from the moment you came there with the defendant to the last time that you left the room?

A. I wouldn't say that I could, no.

Q. Can you tell us something that occurred there as best you recollect?

A. Well he tried to in his way convince us that he was [fol. 19] an ordained minister.

Q. Did he show you any proof of that fact?

A. No sir, he didn't.

Q. Go ahead.

A. Well that's about all. It takes him a long time to do that.

Q. Was the defendant handled roughly while he was in that room?

A. No sir.

Q. Did you hear anyone say to the defendant, "You unpatriotic dog"?

A. No sir I didn't.

Q. Did you see anyone push the defendant into a chair?

A. No sir.

Q. Was the defendant at that time talking in a loud tone?

A. The defendant?

Q. Yes, the defendant?

A. He generally talks in a loud tone.

Q. I asked you whether or not at that time the defendant was talking in a loud tone.

A. His usual tone, yes.

Q. How do you know it was his usual tone?

A. The one he uses on the street.

Q. You testified, didn't you, that the first time you saw this defendant was in the morning of that day?

A. That's right.

Q. Was he using the same tone on the street that he used?

A. That's right.

Q. Did he use the same tone when he addressed the Marshal in the words you said he did?

A. Oh I should say he perhaps let out a little more.

Q. You mean, was a little louder?

A. That's right.

Q. Little more boisterous?

A. Yes I should say so.

Q. I take you back once more at the time where you met up with the defendant and the two officers and Marshal Bowering. And I ask you to repeat once more what Marshal Bowering said to the defendant when he first saw him.

A. He reminded him that he had told him before that he would incite trouble if he didn't quiet down, that the people were quite upset.

Q. Wasn't this said in a loud tone?

A. I wouldn't say so.

Q. Wasn't it said in an angry mood?

A. No I wouldn't say so.

Q. Did anybody else there say anything to the defendant?

A. Not that I know of.

Q. And as far as you know there was no apparent reason for the defendant to say what he did?

A. I can think of none.

Q. At the time that you first met Marshal Bowering after he had just finished talking to the defendant, that's the first time, as you recall, did you strike the defendant?

A. No sir.

Q. Did you raise your hand to him?

A. No sir.

Q. How far away were you from the defendant when you first met Marshal Bowering?

A. When I went toward that point, if I might tell it in my way, when I went toward that point I was coming from across the street over by the Scenic. There was nothing at all happening at that time.

Q. So far as you could see.

A. And the Marshal had moved away from Walter Chaplinsky and he had moved toward the City Hall and I walked along behind him in that direction. I did catch up with him before we got to the City Hall.

[fol. 20] Q. Before you caught up to him did you have any conversation with anybody?

A. No.

Q. Did you engage in any conversation with the men that might have been near there?

A. Not at that point.

Q. Well let me ask you this. Did you engage in any conversation with any men who may have been there?

A. No I didn't.

Q. You just said not at that time.

A. I stopped and talked with some fellows just this side of the liquor store, that is, between the liquor store and the point at which Chaplinsky was selling the papers.

Q. When was that in relation to the time you met Marshal Bowering?

A. It was just after he moved away from the crossing and I was following along.

Q. You were following along and talked with these men?

A. Yes.

Q. Was it concerning the defendant?

A. Yes sir.

Q. What did you say to them?

A. They asked me how much longer we were going to stand for that damned stuff and I told them at the present time there was nothing that we knew of under the statute that would prevent him nor could prevent him from doing it.

Q. Did you say there was nothing you could do about him?

A. That's right, I did.

Q. Did you advise them to take their own course of action?

A. I didn't. On the contrary, I advised them to leave him alone.

Q. You are sure of that?

A. I am absolutely sure.

Q. And you are sure you did not join with this group of men in attempting to and actually in beating the defendant?

A. Am I sure of it?

Q. Yes.
A. I am absolutely sure, yes sir.

Mr. Albert: That's all.
Mr. Beamis: That's all.

LYMAN PLUMMER. Mr. Plummer, called by State, being duly sworn, testified as follows:

By Mr. Beamis:

Q. You state your full name.
A. Lyman Plummer.
Q. Where do you live?
A. Milton.
Q. You are a Deputy Sheriff of this county?
A. Yes.
Q. Calling your attention to April 6th last whether or not you were in the police station in Rochester some time that day?
A. Yes I was.
Q. What part of the day?
A. Some time after dinner I know I left and went down there.
Q. Was Marshal Bowering present?
A. Yes he was.
Q. Did you leave the police station at any time during the afternoon in company with Marshal Bowering?
A. Yes I did.
Q. Where did you go?
A. Shortly after I'd got over in Rochester I went into the police station and stood there and before I got any chance [fol. 21] to do any talking really why somebody hollered there was a riot so we left and went down the street.
Q. How far down the street did you go?
A. Oh a few feet below the entrance to City Hall.
Q. Did you meet anyone?
A. Yes.
Q. Who did you meet?
A. Well there was two officers coming with a man and a few people following along.
Q. Do you know who the man was that was with the officers?

A. It's the respondent here.

Q. Was there any conversation at that time?

A. Any conversation?

Q. Conversation take place when you met him?

A. Well there was no conversation that I know of because I was standing back I think talking with Officer Nickerson I think talking with him, I'm not positive, until somebody made the statements against Mr. Bowering.

Q. At any time during that time while you were there together did you hear any remarks addressed to Mr. Bowering?

A. Yes sir I did.

Q. What were those remarks?

A. He was called a God damned racketeer, a damn Fascist and the whole city government of Rochester was Fascists or agents of Fascists.

Q. Who addressed those remarks to Marshal Bowering?

A. Mr. Chaplinsky.

Mr. Beamis: That's all.

Cross-examination.

By Mr. Albert:

Q. Just what is your position in the City of Rochester?

A. My position in the City of Rochester?

Q. Yes?

A. Just as much there as anywhere in the county.

Q. What is your office in the county?

A. The only office we have in this county is here in the courtroom.

Q. What position do you hold?

A. Deputy Sheriff.

Q. You are Deputy Sheriff in this county?

A. Right.

Q. How long have you known the defendant?

A. To my knowledge I never have seen the gentleman before.

Q. Before when?

A. Before that, that day.

Q. Did you ever see the defendant before the time that you met him in the company of two other officers?

A. No I did not.

Q. Just previous to the time that you met the defendant and these two people were you in the square?

A. No I was not.

Q. Were you in the vicinity of there?

A. No I came down from home, I believe I parked my car very close to the City Hall and went right in.

Q. You said that someone said there was a riot?

A. That's right.

Q. Do you recall who that was?

A. I don't know. Somebody went by in the car.

Q. Now you went from the police station and you met the defendant?

A. Right.

Q. In the company of two officers?

[fol. 22] A. That's right.

Q. And there were some people following the defendant?

A. That's right.

Q. Was this a large group?

A. No.

Q. Could you tell me approximately how many there were?

A. Oh maybe six or eight.

Q. Approximately how many were there?

A. Six or eight.

Q. Six or eight?

A. Yes.

Q. Did you hear Marshal Bowering say anything to the defendant?

A. He made some remarks but as to what he said I could not say.

Q. And to those remarks did the defendant answer?

A. Yes I heard him make the statement.

Q. That you just testified that he made?

A. That's right.

Q. Were those statements that he made said in a loud tone?

A. Well, I don't know what his voice is, whether he naturally speaks in a loud tone or a low voice.

Q. Would you call the tone that he used loud?

A. No not exceptionally, just probably a common voice.

Q. Then as far as you knew according to the voice that you heard the man was not excited?

A. As far as I know, yes.

Q. Do you recall whether or not the remarks made by Marshal Bowering was said in a loud tone?

A. I do not.

Q. How did you know?

A. He couldn't have been in very loud tone if I didn't get his remarks.

Q. How did you know he made the remarks?

A. I could hear something but what it was he said I don't know.

Q. Did you then go back to the police station with the defendant and the others?

A. I went back in the police station, yes sir.

Q. Where did you go when you got into the station?

A. Well as I remember I was around the City Hall there, somewhere in the hall, I think I was in the Marshal's office and most of the time I was talking with three children.

Q. Were you in the office at the same time that the defendant was?

A. I believe I was in there some of the time, yes.

Q. Did you hear any loud talking at that time?

A. No I did not.

Q. Did you hear anyone call the defendant an "unpatriotic dog"?

A. I did not.

Q. Did you see any one push the defendant rather roughly into a chair?

A. I did not.

Q. During the time that you were there was any of the conversation that you heard said in a loud tone?

A. I wouldn't say so, no.

Q. Would you say that the defendant spoke in a loud tone?

A. I don't know as I heard him talking any after he was in the police station or inside City Hall.

Q. You don't recall whether or not he said anything?

A. Not to my knowledge.

Q. When you left the room in which the defendant was, where did you go

A. I believe I went out in the hall.

Q. And from there where did you go?

A. Well eventually I probably went home.

[fol. 23] Q. While you were in the room with the defendant did some outsider, someone who was not an officer of the law, seek entrance to the room?

A. Not to my knowledge.
Q. You don't remember anything concerning that?
A. No I don't.

Mr. Albert: That's all.
Mr. Beamis: That's all.

(Short recess)

Mr. Beamis: The State rests, your Honor.
Mr. Albert: Your Honor please, I would at this time like to renew my motion to dismiss and quash.
Court: Motion denied.
Mr. Albert: Will you please make a note of that?

RESPONDENT'S OPENING STATEMENT BY MR. ALBERT

May it please the Court, Mr. Foreman and gentlemen of the jury. The offense charged against the defendant is not of a serious nature. So far the circumstances surrounding that offense were of a very serious nature. The defense will show first that there has been a neglect, a wilful neglect on the part of the police and the public officials in the City of Rochester——

Mr. Beamis: If your Honor pleases, the State objects.

Court: I don't know what you are driving at but it doesn't seem as if it will be competent.

Mr. Albert: First that the defendant Walter Chaplinsky on the day charged was engaged in religious work in the City of Rochester. Second that on that day he was unjustifiably assaulted and beaten by a group of men——

Mr. Beamis: Your Honor please——

Court: That is out of the question.

Mr. Albert: Your Honor please, I have my exceptions on that?

Court: Yes. The issue is whether or not he said these words.

Mr. Albert: Issue also is whether or not he was provoked. Please save my exception.

Court: Whether he said it is the only question.

Mr. Albert: Third, that he was insulted and that while he was being so insulted, abused and unjustly and unduly provoked he made answer to a public official in the City of [fol. 24] Rochester and when the defense puts on its case

I wish that the jury will pay the strictest attention to it because, as I have said, the offense itself is not serious but the circumstances around that offense are serious and we must bear in mind those circumstances which occurred in the United States of America.

GREGORY GESSIS

GREGORY GESSIS. Mr. Gessis, called by respondent, being duly sworn, testified as follows:

By Mr. Albert:

Q. What is your full name?
A. Gregory Gessis.
Q. Where do you live, Gregory?
A. I live in Rochester.
Q. What is your occupation?
A. I work on the W. P. A.
Q. Some time on the afternoon of Saturday, April 6th, 1940, did you see the defendant?
A. Yes sir.
Q. Where did you see the defendant?
A. Right opposite the Scenic Theatre, or Dodge Block, this side of the Dodge Block.
Q. Do you know the defendant?
A. Yes sir.
Q. How long have you known him?
A. I know him for about a year now.
Q. What was the defendant doing when you saw him?
A. He was advertising Watch Tower publications.
Q. What is the Watch Tower publications?

Mr. Beamis: Your Honor please, I object to this line of questioning, has no bearing on the issue in this case.

Court: It hasn't as far as the ruling, that evidence is all excluded.

By Mr. Albert:

Q. How far were you from the defendant when you first saw him?
A. I was walking down the street.
Q. What street?

A. On North Main Street.

Q. When you first saw the defendant how far were you from him?

A. About thirty feet.

Q. At the time that you first saw the defendant did you notice whether or not there was anyone else there?

A. Yes sir there was a large group of men on the sidewalk.

Mr. Beamis: Your Honor please.

Court: So far that is all right, go ahead.

Witness: There was a large group of men on the side of the Dodge Block.

By Mr. Albert:

Q. Did you notice anything else at that time?

A. No sir.

Q. What did you do from then on?

A. I kept on walking down South Main Street.

Q. From there where did you go?

A. I turned around and came back.

Q. Where did you go when you came back?

A. On the other side of the street I saw a flag.

Q. I asked the question where did you go?

[fol. 25] A. I just walked back home I guess.

Q. On what street were you?

A. On South Main Street.

Q. At that time did you see the defendant?

A. I didn't see him.

Q. You didn't see him at that time. When was the next time that you saw the defendant?

A. I saw him, the police taking him away.

Q. And where was that?

A. That was opposite the Scenic Theatre.

Q. Opposite the Scenic Theatre?

A. Yes sir.

Q. Just previous to the time that you saw the police taking him away did you see anything else?

A. They were taking him away, that's all.

Q. Did you see anything else?

A. Well they were mistreating him, roughly handled.

Q. Did you see this?

A. Yes sir.

Q. Who was doing this?

A. The police officers.

Q. Are those police officers in this courtroom?

A. Their backs were turned to me, I didn't know who they were.

Q. Were you here during the entire procedure of this case?

A. Yes sir.

Q. Did any of those officers testify?

A. What's that question?

Q. Did any of those officers testify?

A. Yes.

Q. Do you know their names?

A. Yes sir.

Q. What are their names?

A. Marshal Bowering and the other, I can- pronounce.

Q. Deputy Sheriff?

A. Marshal.

Q. Marshal Bowering?

A. Yes.

Q. And who else?

A. I can't pronounce the other.

Q. Can you spell it?

A. No.

Q. Do you see the man in the courtroom?

A. Yes sir.

Q. Can you point him out?

A. Right there.

Q. What gentleman is that?

A. The first one.

Q. The man with the brown shirt and black tie?

A. And black tie.

Q. Would you please repeat once more what you saw them doing then?

A. They was roughly handling.

Q. What do you mean by roughly handling?

A. Pulling him and pushing him.

Q. What next did you notice?

A. I didn't notice any-, I stayed down there. I started an argument with some fellow down there.

Q. You started an argument with someone?

A. Yes sir.

Q. What did you do after that?

A. The police broke us up and I followed.

Q. You followed who?

A. The police officer and Walter Chaplinsky.
Q. How far did you follow them?
A. To the police station.
Q. Did you go into the police station?
A. Yes sir.
Q. Where in the police station did you go?
A. Outside the door of the police station.
Q. Outside the door of the police station?
A. The office.
Q. Is there a separate office with the police station?
A. The city building and the office is in the city building.
Q. While you were outside that door was there anyone in that room?
A. Yes the police officers and Walter Chaplinsky.
Q. How do you know the defendant was in that room?
[fol. 26] A. Because they were talking to him.
Q. Did you hear the defendant's voice?
A. Yes sir.
Q. Did you hear any other voices?
A. Yes sir.
Q. Could you identify those voices?
A. Yes sir.
Q. What did you hear while you were standing at the door?
A. I heard a noise and at the same time somebody, Marshal Bowering said, "Sit down, you unpatriotic dog."
Q. Are you sure about his voice?
A. Oh yes.
Q. You know his voice?
A. Yes sir.
Q. What else did you hear?
A. Then I heard Marshal Bowering say "I am going to arrest you for calling me a God damn Fascist."
Q. Would you mind repeating that once more?
A. Marshal Bowering said, "I am going to arrest you for calling me a God damn Fascist."
Q. "I am going to arrest you for calling me a God damn Fascist"?
A. Yes sir.
Q. What else did you hear?
A. I heard Walter Chaplinsky say, "You're a liar, I did not."
Q. Did you hear anything else?
A. I didn't see anything else.

Q. I asked you——
A. I didn't hear anything else.
Q. —if you heard anything else.
A. I didn't hear anything else.
Q. What did you do next?
A. I stood there and Mr. Downing walked in the police station.
Q. Mr. who?
A. Downing.
Q. Is that gentleman in the courtroom?
A. Yes sir.
Q. What did he do?
A. He was all excited and he went in the police office.
Q. Did you hear anything after he went in?
A. Yes sir, somebody said, "The best thing you can do is get out."
Q. What happened next?
A. He came out. I was talking to some fellows outside and I——

Court: No.

By Mr. Albert:

Q. He came out?
A. Yes.
Q. What did he do next?
A. Just talking to the fellows.
Q. What did you do next?
A. I stood beside the police, the office, the door of the police station.
Q. How long were you there?
A. About four minutes.
Q. Were you there during the entire time that the defendant was in the room?
A. No sir.
Q. How soon did you get to the room after the defendant was taken there?
A. I should say about a minute and a half or two minutes, right after.
Q. And all during the time that you were there what you have testified is what you heard?
A. Yes sir.
Q. From the police station where did you go?
A. I walked back down the square.

Q. Did you see Marshal Bowering, another gentleman, meet the defendant who was being taken by the two police officers?

A. I wasn't there at the time, no sir.

Q. You didn't see that?

A. No.

Mr. Albert: That's all.

[fol. 27] *Cross-examination.*

By Mr. Beamis:

Q. How long have you lived in Rochester?

A. Four years.

Q. You know the Marshal?

A. Yes sir.

Q. How well do you know him?

A. I see him around the street.

Q. Does he talk to you very often?

A. No sir.

Q. But you could identify his voice anywhere?

A. Oh yes.

Q. You said you were across from the Scenic Theatre when you saw the police take Mr. Chaplinsky away?

A. I wasn't across the street.

Q. Where were you?

A. I was, I ran to the scene.

Q. How did you know what was going on?

A. Because I seen the flag and the mob.

Q. Where were you? Just where were you?

A. I was near Hanson Street there the corner.

Q. About how far from the scene was that?

A. That's about two hundred feet.

Q. How many officers took Mr. Chaplinsky away?

A. I didn't notice, there was a large crowd, about three or four I guess.

Q. Three or four officers?

A. Yes.

Q. Did you say you knew them?

A. I didn't know who they were, no.

Q. You did say they testified here today though?

A. Yes.

Q. How did you know which officers they were that took him away?

A. Because I followed them up.
Q. You followed right along behind the officers?
A. I mean, what is that question again?

(Question read by stenographer.)

A. Well I didn't say that.
Q. You say you followed right along behind?
A. I seen them take him away and I stopped and I had an argument with a fellow.
Q. Then you didn't follow right along behind them?
A. No.
Q. How did you know he went up to the police station?
A. Well I wasn't right in back of them but they were about fifty or sixty feet ahead of me.
Q. They were in your view all the time?
A. Yes.
Q. And you didn't see them stop and talk with anyone?
A. No.
Q. They went right into the police office?
A. Yes sir.
Q. Closed the door?
A. They didn't close the door.
Q. Are you sure?
A. Yes sir.
Q. Where did you stand there, right in front of the door?
A. Yes, right in front of the door.
Q. And you could hear everything that was going on?
A. Yes sir.
Q. You could look right in and see them?
A. No sir. I could sometimes, the door, some men were passing by coming out of there.
Q. I thought you said the door was open?
A. I didn't say the door, I said the doors were this much open. I can't see him from there.
Q. How close to the door were you?
A. About two feet.
Q. About two feet away from it?
A. Yes sir.
Q. Leaning against the wall?
A. Yes.
Q. Have your ear right up to the door?
A. Not right up to it.
Q. How long did you say you were in front of the door?
[fol. 28] A. What did you say?

Q. How long did you say you stayed in front of the door?
A. About four minutes.
Q. About four minutes?
A. Yes sir.
Q. All this happened very quickly then in about four minutes?
A. Yes sir.
Q. What time was it?
A. Half past three, quarter of four I guess.
Q. Did you see Mr. Chaplinsky come out of there?
A. No.
Q. You didn't stay until he came out?
A. No.
Q. But you saw him in there?
A. I heard his voice.
Q. You couldn't see him?
A. No sir.
Q. Couldn't see the Marshal either?
A. No sir.
Q. Was there anybody else in there beside the Marshal?
A. Quite a few officers.
Q. No one else?
A. Few men.
Q. They go in when the Marshal went in with Chaplinsky?
A. I don't know.
Q. Did you see them walk into the City Hall?
A. Yes sir.
Q. How many officers were there?
A. I don't know. There was a little crowd in back of the officers and Chaplinsky.
Q. But you want to leave it that there were four officers that took him up there?
A. I don't know the correct number, no.
Q. Well it might have been one then?
A. I seen them down, there wasn't one because two of them had his hands and there was others walking alongside of him.
Q. You don't know whether there were two, four, six or ten?
A. No.

Mr. Beamis: That's all.
Mr. Albert: That's all.

WALTER CHAPLINSKY. Mr. Chaplinsky, the respondent, being duly sworn, testified as follow:

By Mr. Albert:

Q. What is your full name?
A. Walter Chaplinsky.
Q. Where do you live, Walter?
A. Dover, New Hampshire.
Q. How long have you resided in Dover?
A. About eleven months.
Q. What is your occupation?
A. An ordained minister of the gospel commissioned by the Almighty God to go forth and preach the true facts of the situation of the Bible to the people. It is the Christian's permission to go forth to people in——

Court: No, not that.
Witness: Your Honor, I wish to establish the fact——
Court: Next question.
Mr. Albert: Save my exception.
Court: Yes.

By Mr. Albert:

Q. On the Saturday in question were you engaged in this work?
A. Yes sir.
Q. Where were you?
A. On the streets of Rochester.
Q. Any particular place?
A. On the corner of East Wakefield Street and Main Street.
Q. In the afternoon of that day did something unusual occur to you?
A. Yes sir.
[fol. 29] Q. Will you please tell the Court and jury what that was?
A. Yes sir.
Q. In the order of which it took place.
A. On that Saturday afternoon around 3:30 I stood on the corner across from the Scenic Theatre and advertised the Watch Tower magazines which are Christian publications.
Q. What else were you doing?
A. I stood there and made my announcements and while I stood there there was a crowd formed around me, a crowd

of men about fifty or sixty men; while I continued to stand there Marshal Bowering came by and with him came a Mr. — I learned his name, last name was Bowman, and this Mr. Bowman spoke to the Marshal and said——

Court: Never mind that.
Witness: That is evidence, your Honor.
Court: You're not ruling on the evidence.

By Mr. Albert:

Q. Did you hear what the man standing next to the Marshal said?
A. Yes sir.
Q. This was said in your presence?
A. That's right.
Q. And the Marshal was in your presence?
A. That's right.

Mr. Albert: Can he testify, your Honor?
Court: No.

By Mr. Albert:

Q. What happened next?
A. Well this Mr. Bowman shot out his left arm and caught me by the throat with his left hand and struck me with his right although he did not hit me, I avoided his blow. I then wrenched myself free and turned to the Marshal and said, "Marshal I want you to arrest this man;" and he said, "I will if I feel like it."
Q. Then what happened next?
A. Right there the Marshal walked away and so did this Mr. Bowman walk away likewise and I continued this program, my message of kingdom of the Bible. About four or five minutes later I glanced down the street, South Main Street, and I seen this man coming down with a flag in his hand.
Q. Who?
A. This Mr. Bowman.
Q. Was this the same gentleman——
A. That attempted to strike me, yes sir. He came down and I faced him as I stood there on the curb of North Main Street. This Mr. Bowman as he was about ten feet away from me he carried this flag in a spear-like position and he came forward and gave a terrific lunge to plunge me

through. I avoided his blow and as he came by he pushed me into the gutter against an automobile standing there. And he walked by to the corner and offered the flag to a man standing there and I presume he put the flag in a corner hole——

Court: No. All right.

Witness: And he came back toward me and caught me by the collar and said, "You son of a bitch——

Court: Here, here, that is out.

Witness: Those were his very words, sir.

Mr. Albert: I would like to take exception to that. Please make note of my exception.

Witness: He took me by the collar——

[fol. 30] *Mr. Albert:* No, that is out, Walter.

Court: No.

By Mr. Albert:

Q. Go on from there, skipping over this incident.

A. Yes sir. Well he asked me, "Will you salute the flag?"

Court: Who are you talking about now?

Witness: This Mr. Bowman.

Court: That is excluded.

Witness: I'm sorry. I see.

By Mr. Albert:

Q. When did you next see the Marshal?

A. Why as I was being picked up from the ground.

Q. Where was he then?

A. Why he was right there on the scene.

Q. He was right there on the scene?

A. Yes sir, he came just right by and caught hold of me to help lift me up.

Q. Was anyone else helping you?

A. Yes sir.

Q. Who is that?

A. Officer Lapierre.

Q. This gentleman here?

A. That's right.

Q. What occurred after that?

A. After he picked me up?

Q. Yes.

A. Sheriff Deputy Dunlap was there, Marshal Bowering and Officer Lapierre and two others took hold of me and

start taking me down to the police office in a rough manner. I turned to the Marshal and said, "Will you please arrest the ones who started this fight?" and the Marshal said, "Shut up you damn bastard and come along." And I said, "You are a damn Fascist and a racketeer," and they started——

Q. Where was this statement made please?

A. Going along on Wakefield Street toward the City Hall.

Q. Continue.

A. They shoved me along roughly. As we approached City Hall on the lane or sidewalk I noticed the man that struck me.

Q. You noticed a man that struck you?

A. Leading me along with officers.

Q. Who was that man?

A. Sheriff Ralph Dunlap, Deputy Sheriff.

Q. You are sure of that?

A. I am absolutely positive.

Q. Continue from there.

A. I said to him, "Who are you?" He said, "I am a Deputy Sheriff." I said, "If you are a Deputy Sheriff this whole city officials of Rochester are Fascists."

Q. Is that all you said?

A. Yes sir.

Q. What happened after that?

A. We entered the City Hall and into the police station or a Marshal's office there and Sheriff Ralph Dunlap said, "You son of a bitch, we ought to have left you to that crowd there and have them kill you," and Marshal Bowering flung me down in a chair and he said, "You unpatriotic dog, I am going to arrest you an account you called me a God damned Fascist," I said, "You are a liar, I did not call you a God damned Fascist."

Q. What did you call him?

A. A damn Fascist.

Q. What happened after that?

A. After that I was fingerprinted by Officer Benton I think, number forty-four.

Q. Were you taken into custody?

A. Yes I was, down in a cell.

Q. Is that as far as you know the full complete story of what occurred on that afternoon?

[fol. 31] A. There is much in detail.

Q. What do you mean?

A. I recollect now that this here state trooper officer forty-four——

Court: No. Question is too broad.

Witness: Why——

Court: Just a moment. I'm not talking to you.

By Mr. Albert:

Q. Were there any other officers in your presence at the time that you were picked up besides those that you have already mentioned?

A. As far as I know at that time I thought they were the mobsters but later on they turned out to be officers.

Q. I didn't ask you that. I asked you whether or not there were any other officers besides those who were present at that time that you have already named?

A. You mean in uniform?

Q. In uniform or otherwise, that you knew?

A. I only seen Marshal Bowering and Officer Lapierre in uniform.

Q. Were there any other threats made to you during that day?

A. Before the fight?

Court: By who?

By Mr. Albert:

Q. Before that scuffle, yes.

A. Well about ten minutes before the fight occurred a boy came to me——

Court: No, now we won't go into that.

Mr. Albert: I would like to except to that, your Honor, if I may. Please make a note of it.

Q. Relative to the words that you are charged with saying did you say those words in a loud tone?

A. Yes, a rather loud tone so they could hear above the crowd.

Q. What was your inner feeling at that time?

A. Of excitement.

Q. You were excited?

A. Yes I was.

Q. Were you very excited?

A. I wouldn't say any extreme but I was excited.

Q. Why were you excited?

A. I was, I had received about seven to ten punches and I was cast down between the gutter and the wheels of an automobile and there was about four or five police officers on top of me.

Q. Was there anything else that caused you to be excited?

A. Not in a general way that I know.

Q. Referring to the words spoken to you by Marshal Bowering at the time you addressed him in the language charged, can you tell us something relative to the manner of his speech?

A. Yes sir.

Q. What was it?

A. Why his manner of speech was one of contempt and his action was as if I was a criminal.

Q. What do you mean, his action was as if you were a criminal?

A. Why he caught hold of me, likewise the other officers, as if I had started a fight and they swung me over the street staggering.

Q. Was this done before you spoke the words you were charged with saying?

A. Yes sir, at that time I spoke to the Marshal and said, "Why don't you arrest the ones that started the fight?" [fol. 32] Q. We heard that.

A. Sorry.

Q. Was there any other event before you said those words that caused you to be excited other than those that you have mentioned?

A. No sir.

Mr. Albert: That's all.

Cross-examination.

By Mr. Beamis:

Q. Mr. Chaplinsky, you were in Rochester that day, were you?

A. Yes sir.

Q. You did see some police officers up there?

A. Yes I did.

Q. And among those you saw was Marshal Bowering?

A. Marshal Bowering and Officer Lapierre.

Q. There's some question in your mind just how many officers you did see?

A. I only see two in uniform and one officer passed by during the course of my standing there on the corner. He was a stout officer, don't know his name.

Q. How many officers picked you up?

A. Two in uniform.

Q. How many marched along the street?

A. About five or six.

Q. Who were the two who picked you up?

A. Marshal Bowering and Officer Lapierre with others as the Deputy Sheriff Ralph Dunlap.

Q. No question in your mind about that?

A. Yes sir.

Q. You are positive about that?

A. I am absolutely sure.

Q. You were pretty excited at the time though?

A. At times.

Q. At that time?

A. At that time, yes sir.

Q. There's no question but what you walked from the square to the police station?

A. There is no question what?

Q. But what you walked from the square to the police station?

A. That's right, we walked along.

Q. You went into the police station eventually?

A. We did.

Q. Did you stop and talk along the way?

A. No, he didn't give me a chance to talk.

Q. Just pushed you right along?

A. That's true.

Q. Just where was it you said something to the Marshal?

A. What do you mean I said something?

Q. Did you say anything to him on the way up?

A. That's true I said along Wakefield Street there when I spoke to him after he called me a bastard, to arrest the ones who started the fight.

Q. I mean when you were coming up the street you made some statement to him?

A. I told him arrest the ones that started the fight.

Q. Did you or didn't you call him a God damn racketeer?

A. I called him a damn Fascist and a racketeer.

Q. And you made some mention of the city officials of Rochester as being Fascists or agents of Fascists?

A. I did.

Mr. Beamis: That's all.

[fol. 33] *Redirect examination.*

By Mr. Albert:

Q. Were you very familiar with the spot at which you were standing when you say you were attacked?

A. Yes sir.

Q. Are you very familiar with the spot where the traffic officer stands on the street?

A. Yes.

Q. Can you give us some idea of the distance between the point where you were standing and the point where the officer was when he was directing traffic?

A. I would say from here to Mr. Blackburn.

Q. Mr. Blackburn?

A. Yes.

Q. Who was the officer on traffic duty there?

A. Officer Lapierre.

Mr. Albert: That's all.

Mr. Beamis: That's all.

Mr. Albert: The defendant rests, your Honor.

Court: Any rebuttal?

Mr. Beamis: No your Honor.

Court: Evidence closed.

(Counsel in discussion at Bench)

Mr. Albert: First I want to renew my motion to dismiss and quash and file requests for charge to the jury.

(At Bench):

Mr. Albert: The defense moves for a directed verdict on the basis that the words charged are not derisive, offensive or annoying within the terms of the statute and constitute no offense at law. In addition to this, your Honor, I have these already written out.

Court: I am going to tell the jury that they are offensive, call anybody a racketeer.

Mr. Albert: I wish also to file these other four issues in regard to a defendant's motion for a directed verdict.

(End at Bench).

Court's charge to the Jury:

Mr. Foreman and gentlemen of the jury. For a criminal case, this case is really very much simplified and that really takes away from me the necessity of giving you certain preliminary instructions that are given in different criminal [fol. 34] cases. I mean by that, for example, with reference to any complaint in the event it isn't proved what has been said, and also in reference to the presumption of innocence on the part of the respondent who is brought to trial. That presumption remains during the trial until such time as the State has succeeded in overcoming that presumption by proper evidence, and again in regard to degree of proof required by the State. In other words, the State has got to prove a criminal case beyond a reasonable doubt. I say this because the respondent practically has admitted what the State charges, so that you are not concerned with the degree of proof. The only thing you are concerned with is whether or not there has been any commission of an offense here, which presents a straight question of fact for you to determine.

The Legislature of our State has seen fit to affix a penalty to the act of addressing any offensive, derisive or annoying words to any other person who is lawfully in any street or other public place.

The respondent here admits having addressed certain words to someone on a public street. It may be that you can decide this case by just determining whether the words that he admits he did use were offensive, derisive or annoying. His version of what he admits saying does not differ a great deal from the State's version of what was said. It is only in the degree and the number of words that might have been used. It may be that you believe the words spoken were as testified to by the State's witnesses. If so, that is, if the words used were as the State claims they were, then again you will decide whether those words claimed to have been used, as claimed by the State, were offensive, derisive or annoying. If your answer on this proposition is in the affirmative, your verdict must necessarily be one of guilty. If your answer is in the negative, then of course your verdict must be one of not guilty.

We are not concerned here with freedom of speech or religious freedom or anything of that kind. The sole question is whether there has been violation of a statutory law. In other words, whether any statute enactment prohibiting use of offensive, derisive or annoying words to anyone in a public place or a public street has been violated by the respondent. I need not comment on the meaning of the words used. You know what they mean as well as I do. It is for you to determine what the meaning is and whether they were in fact offensive, derisive or annoying.

[fol. 35] You are not concerned with the punishment end nor with what might be the effect or outcome of this case after you have rendered your verdict. That is a matter left entirely with the Court and if there is any outside effect that is entirely up to the Court also. But again I repeat, all that you are primarily concerned with is whether there has been a violation of the statute here that I have read to you and whether the evidence supports the allegation that the statute has been violated.

When you have reached a verdict you will return to the courtroom, you will then be polled by the Clerk and you will be asked by the Clerk orally whether the respondent is guilty or not guilty. You may retire.

VERDICT: Guilty.

[fols. 36-37] IN SUPERIOR COURT OF STRAFFORD COUNTY

DOCKET ENTRIES

#2119

STATE

v.

WALTER CHAPLINSKY

Solicitors: F. E. Blackburn, Alfred A. Arthur.

Appeal from Rochester Municipal Court filed April 19, 1940. Using offensive and derisive and annoying language and names on a public sidewalk in Rochester, N. H. Complaint, Recognizance and copy of Public Laws, Chapter 378, Sec. 2, filed.

Arraigned Sept. 16, 1940.

Plea: Not Guilty.

Trial by jury Sept. 16, 1940.

Defts. motion to quash, motion to dismiss, requests for charges to jury, motion for directed verdict—filed Sept. 16, 1940. All motions denied. Deft. excepts.

Verdict: Guilty.

Sentence: Costs, $42.54. Six months in House of Correction.

Deft. moves for stay of execution of sentence.

Motion denied. Mittimus issued. Deft. committed Sept. 16, 1940.

Petition for writ of habeas corpus, and Petition for stay of execution of sentence, filed in Supreme Court Sept. 23, 1940.

Ordered by Supreme Court Oct. 1, 1940: Stay of execution granted.

Recognizance in sum of $500 taken and filed Oct. 2, 1940. Deft. released from House of Correction.

Complete transcript of evidence filed Oct. 15, 1940.

Order of Supreme Court (above), filed Oct. 31, 1940.

Defts. Bill of Exceptions filed Nov. 13, 1940.

Approved and allowed.

Case transferred to Supreme Court, and continued; copies distributed Dec. 3, 1940.

Feb. Term 1941—Order of Supreme Court filed April 3d, 1941: *Exceptions Overruled.*

In Witness Whereof I have hereunto set my hand and affixed the official seal of said Court this 2d day of October, 1941.

William H. Roberts, Clerk.

[fol. 38] In Supreme Court of New Hampshire

State

v.

Walter Chaplinsky

Complaint, for violation of P. L., *c.* 378, *s.* 2. Trial by jury. Verdict of guilty. The defendant seasonably moved to quash on the ground that the statute is void under Article 6, Clause 2, and the First Amendment and Fourteenth

Amendment (Section 2) of the Constitution of the United States. A motion to dismiss upon the same grounds was also seasonably made. Both motions were denied, and the defendant duly excepted. At the close of all the evidence, these motions were renewed and denied, subject to exception. The defendant further moved that a verdict be directed in his favor, assigning the same grounds and asserting that (1) the evidence, taken in the light most unfavorable to the defendant, failed to justify a finding of guilt, and (2) the words charged were not such as to come within the prohibition of the statute. The defendant also excepted to the exclusion of certain remarks of his counsel in the opening statement and to certain evidence. The material facts appear in the opinion. Transferred by *Burque*, C. J. on the defendant's bill of exceptions.

Frank R. Kenison, Attorney-General, *Ernest R. D'Amours*, Assistant Attorney-General and *John F. Bramis*, County Solicitor (*Mr. Kenison* orally), for the State.

[fol. 39] *Hayden Covington* (of New York), *Alfred A. Albert* (of Massachusetts) and *Frank E. Blackburn* (Mr. Covington orally), for the defendant.

OPINION—March 4, 1941

PAGE, J.:

The statute involved is P. L., *c.* 378, *s.* 2, which reads thus: "No person shall address any offensive, derisive or annoying word to any other person who is lawfully in any street or other public place, nor call him by any offensive or derisive name, nor make any noise or exclamation in his presence and hearing with intent to deride, offend or annoy him, or to prevent him from pursuing his lawful business or occupation."

The complaint is that Chaplinsky, being in the street at Rochester, addressed to the City Marshal these words: "You are a God damned racketeer" and "a damned Fascist and the whole government of Rochester are Fascists or agents of Fascists." These words were testified to by several of the State's witnesses. The defendant admitted the words with the exception of the qualifying "God."

The section of the statute involved has two provisions. The first relates to words and names applied by one directly to another in a public place. The second refers to noises or exclamations, possibly not directed to the person de-

rided, but with the intent expressed. The two provisions are distinct. One may stand separately from the other. Assuming, without holding, that the second were unconstitutional, the first could stand if constitutional. *Woolf* v. *Fuller*, 87 N. H. 64, 69; *Rosenblum* v. *Griffin*, 89 N. H. 314, 320. Since the present case arises solely under the [fol. 40] first provision, there is no need to consider either the construction of the constitutionality of the second. We shall not do so.

The provision now involved has twice been construed by this court. Nearly fifty years ago there was a conviction under it, in a case where the defendant, in the street, addressed to one also in the street the words "You are a God damned blackmailer." The defendant attempted to justify by proving the statement to be true. Since the statute makes no distinction between truthful and untruthful utterances, it was held that the justification was inadmissible. Construing the statute, this court said that its "purpose was to preserve the public peace. The direct tendency of such conduct, like that of (criminal) libel (4Bl. Com. 150, 151), is to provoke the person against whom it is directed to acts of violence." *State* v. *Brown*, 68 N. H. 200. The decision seems to have assumed that the only intent required for conviction under the first part of the section was an intent to speak the words. In any event, that is the construction which we place upon the provision.

Again in 1900, the earlier construction was followed, and it was further held that the act applied where the words were addressed by one to another in a public highway, even though no third person was present to hear the words. *State* v. *McConnell*, 70 N. H. 294. The complaining witness, a woman, was called a bitch, with other obscene words not thought necessary to be printed in the reported decision. 209 Briefs and Cases, 521.

It thus appears that long before the words for which [fol. 41] Chaplinsky was convicted, the construction of the provision was made plain, to the extent that no words were forbidden except such as have a direct tendency to cause acts of violence by the persons to whom, individually, the remark is addressed. This is not a case where, in advance of a judicial interpretation, the defendant could not be bound to understand what was intended by the statute. See *Lanzetta* v. *New Jersey*, 306 U. S. 451, 456.

Another point may be mentioned at once. The defendant asserts that the trial court improperly excluded evidence of, and comment on, the supposed provocation of Chaplinsky growing out of his prior treatment by the crowd. We think the ruling was correct.

The "provocative matter" was this. Chaplinsky was lawfully engaged, on the streets of Rochester, in the distribution of the literature of the sect known as Jehovah's witnesses. Some of those on the streets apparently resented his activities. They may have thought them provocative. At least they complained to the City Marshal, who says he told them that Chaplinsky was lawfully engaged and that he must be left alone. At the same time the Marshal says he informed Chaplinsky that the crowd was getting restless and that he would better go slow. Some hours later, the crowd got out of hand and treated Chaplinsky with some violence. He was then led towards the police station, though apparently more for his protection than for arrest, since his arrest was definitely fixed only after he uttered the words charged, when the Marshal met him on the way. It may be remarked that nobody concerned, taking Chaplinsky at his word, used proper restraint [fol. 42] on this occasion, but that fact, if true, could not be a defence of his own conduct.

At the moment the defendant uttered the words for which he was convicted, he undoubtedly felt resentment because he had been roughly handled by the crowd. His resentment might well enough have extended to the police if they had failed to take any step reasonably within their power to control the crowd, or if they had failed to prosecute anybody who they had reasonable ground to believe had assailed him. But those facts, if true, would not have justified the offensive manner in which he sought to bring the Marshal to what Chaplinsky may have regarded as a sense of his duty. It was not useful or proper comment for bringing truth to light. Its plain tendency was to further breach of order, and it was itself a breach of the peace.

The excluded evidence related solely to Chaplinsky's recital of what he conceived was his mission to "preach the true facts of the situation of the Bible to the people," of "the Christian's permission", and of certain acts of the crowd that seem to have happened outside of the knowledge of the police. As to any possible provocation he had suffered while in the presence of the police, his testimony

appears to have been admitted, though immaterial to the issue of his guilt. The court, in any event, was correct in excluding as immaterial the issues (1) whether the police had been neglectful prior to his offense, (2) whether the defendant had been assaulted by the crowd, and (3) whether, the defendant, in consequence, had been provoked to use the words with which he was charged. The defendant's argument as to this exclusion comes to this—that if he was [fol. 43] provoked, the truth of his appellation of the Marshal could be established. The truth would be no justification. *State* v. *Brown, supra.*

The rule thus established is not severe. Chaplinsky could no more defend unlawful speech on the ground of provocation than could one of the street-crowd have defended a charge of calling Chaplinsky names on the ground that the name-caller had been incensed by Chaplinsky's teachings. The defendant was held to the same duties as those who disagreed with him or with whom he disagreed. The rules of fair conduct in public speech in the street apply indiscriminately to all—whether the speaker be a preacher, an official or a mere by-stander.

The defendant was not entitled to a directed verdict unless the statute is unconstitutional.

Upon the question of constitutionality, the defendant asserts infringement of the fundamental liberties of speech, press and worship. Since he did not print his words or circulate them in printed form and since the words have no perceptible connection with worship or with freedom of religious belief or practice, we shall confine ourselves to the subject of free speech, though cognate rights may have illustrative effect in the course of this discussion.

The right to speak freely, whether in a street or elsewhere, is of primary importance. That is a principle whose general validity nobody denies, and nobody ought ever to deny. But the right may be limited in appropriate situations. The question is whether the limitation imposed by our statute is constitutionally permissible.

[fol. 44] The fundamental basis of the constitutional rule is the necessity for full and free discussion of all subjects which affect ways of life, including religious, social, and governmental questions. This is "essential to the very existence and perpetuity of free government." Cooley, Constitutional Limitations, 7th *ed.*, 596.

"No one can doubt the importance, in a free government, of a right to canvass the acts of public men and the tendency of public measures, to censure boldly the conduct of rulers, and to scrutinize closely the policy and plans of government. This is the great security of a free government. If we would preserve it, public opinion must be enlightened; political vigilance must be inculcated; free, but not licentious discussion, must be encouraged. But the exercise of a right is essentially different from an abuse of it. The one is no legitimate inference from the other. Common sense here promulgates the broad doctrine, *sic utere tuc, ut non alienum laedas;* so exercise your own freedom as not to infringe the rights of others, or the public peace and safety." Story, Constitution of the United States, *s.* 1888.

"Freedom of discussion, if it would fulfill its historic function in this nation, must embrace all issues about which information is needed or appropriate to enable the members of society to cope with the exigencies of their period." *Thornhill* v. *Alabama*, 310 U. S. 88.

If a city officer is guilty of a wrong or a neglect, any person is free to comment, to the end that free government may be preserved. Peaceful and truthful discussion of matters of public interest cannot be penalized merely because others than the speaker may be persuaded of the [fol. 45] truth of the criticism. "Abridgement of the liberty of such discussion can be justified only when the clear danger of substantive evils arises under circumstances affording no opportunity to test the merits of ideas by competition for acceptance in the market of public opinion." *Thornhill* v. *Alabama, supra.*

The only competition for acceptance in that market of opinion to be found in this record is this: the defendant admittedly called the Marshal a damned racketeer and Fascist, in exchange, as the defendant says, for the Marshal's calling him a damned bastard. Either appellation, applied directly to the other on the street, would clearly be a breach of the statute. Neither would rise above the level of name-calling. Neither party could expect the other to be persuaded by such language. Neither remark qualifies as peaceful and truthful discussion of matters of public interest. Each invited personal violence and disturbance of the peace, without any observable tendency to enable the by-standers to test the merits of the competitive ideas,

if they were ideas. We can see no relationship of such utterances to that freedom of speech which is so acutely desirable if free institutions are to be preserved. Such face-to-face reviling is not remotely necessary in the debate of public questions. It is not argument. It has no persuasive power. Its only power is to inflame, to endanger that calm and useful consideration of public problems which is the protection of free government. Its tendency is to useless and dangerous disorder in which the object of free speech is lost to view.

[fol. 46] That there are limitations to the right of even unabusive speech is well recognized. In time of war an argument against military service, at other times permissible, may be penalized because "the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent." *Schenck* v. *United States*, 249 U. S. 47, 52. The evil in that case was the obstruction to recruiting. Nor need the restriction be limited to evil intended, provided the evil be imminent. As Mr. Justice Holmes said, "It is only the present danger of immediate evil or an intent to bring it about that warrants Congress in setting a limit to the expression of opinion where private rights are not concerned." *Abrams* v. *United States*, 250 U. S. 616, 628. In another dissenting opinion, by Mr. Justice Brandeis, in which Mr. Justice Holmes joined, it was again declared that the exercise of free speech may be restricted where speech would "produce, or is intended to produce, a clear and imminent danger of some substantive evil which the State may constitutionally seek to prevent." *Whitney* v. *California*, 274 U. S. 357, 373.

In the case last cited the majority declared (at page 371) that it was not open to question "that a State in the exercise of its police power may punish those who abuse this freedom by utterances inimical to the public welfare, tending to incite to crime, disturb the public peace, or endanger the foundations of organized government and threaten its overthrow by unlawful means." See also Gitlow v. New York, 268 U. S. 652, 666.

[fol. 47] In maintaining the guaranty of free speech, the authority of the State to enact laws to promote health, safety, morals and the general welfare is "necessarily admitted." The limits of this reserved authority must be

"determined with appropriate regard to the particular subject of its exercise." And "the power of the State stops short of interference with what are deemed to be certain indispensable requirements of the liberty assured. • • • Liberty of speech, and of the press, is also not an absolute right, and the State may punish its abuse." The statute must be tested by its operation and effect. And so an act is unconstitutional if it authorizes the suppression by injunction of the future publication of a newspaper found in the past to have printed scandalous matter, whether true or false. The fact that the peace may be disturbed by the continuance of the publication does not warrant complete suppression or censorship of a newspaper which criticizes public officials in terms likely to injure their reputation. Near v. Minnesota, 283 U. S. 697, 707, 708.

Upon similar grounds, a tax upon the advertisements in papers having a circulation of more than 20,000 a week is unconstitutional as a previous restraint. *Grosjean* v. *American Press Company*, 297 U. S. 233. The statutes in these two newspaper cases did not punish abuses; they entirely suppressed, or tended to suppress, the right of press. Nobody can claim that the statute under which Chaplinsky was convicted does more than punish the abuse of free speech. It does not suppress the right of speech, even in particular places. It is not an indispensable [fol. 48] requirement of right that one criticizing a person should be permitted to address him directly in a public place with offensive, derisive or annoying words likely to precipitate a breach of the peace. Charges of official wrong or neglect may be expressed by way of argument to the public in the streets with no more than minor danger of disturbance, and that is enough to meet the requirements.

"These rights may be abused by using speech or press or assembly in order to incite to violence and crime. The people through their legislatures may protect themselves against that abuse. The rights themselves must not be curtailed." Only so can desirable changes be made by peaceful means, which is the purpose of the right of free speech. *DeJonge* v. *Oregon*, 299 U. S. 353, 364, 365. "The limitation upon individual liberty must have appropriate relation to the safety of the state." *Herndon* v. *Lowry*, 301 U. S. 242, 258.

Consequently an act prohibiting the distribution of literature in the streets without regard to involvement in disorderly conduct is too sweeping to be valid. *Lovell* v. *Griffin*, 303 U. S. 444, 451. It strikes at the "very foundation of the freedom of the press by subjecting it to license and censorship." Our statute aims merely to punish the abuse of right (in this case disorderly conduct) and subjects the speaker to no restraint of indispensable right.

Legislation aimed at conduct which impedes free use of the streets may be sustained provided it does not abridge the liberty of one rightfully in the streets to impart [fol. 49] information without interfering with such use. "Prohibition of such conduct would not abridge the constitutional liberty since such activity bears no necessary relationship to the freedom to speak, write, print or distribute information or opinion." *Schneider* v. *State*, 307 U. S. 147, 161. Our statute prohibits conduct which has no necessary relationship to those freedoms.

The right of speech, therefore, "is not absolute, but relative, and must be exercised in subordination to the general comfort and convenience, and in consonance with peace and good order; but it must not, in the guise of regulation, be abridged or denied." The statute making the limitation must meet the test named. And so, if the statute provides for no speech without a permit, and the issuance of the permit depends upon the mere opinion of the licensing official that his refusal will prevent disorder, there is a suppression of the right. *Hague* v. *C. I. O.*, 307 U. S. 496. But prohibition by legislative act of abusive speech under circumstances which the legislature may appropriately believe dangerous to public order, and the punishment of speech unnecessary to the full exercise of the right, is believed to be no restraint, or at most a permissible restraint.

The power and the duty of the State to preserve the peace seems not to be doubted. If, as in *Thornhill* v. *Alabama*, 310 U. S. 88, no clear and present danger of a breach of the peace is inherent in the activity of every person who approaches premises "on strike" for the purpose of publicizing the facts of the labor dispute, and a statute prohibiting picketing for the purpose of such publicizing [fol. 50] is invalid because not addressed to abuses, the statute now under consideration is not of that sort. It aims

at abuses. It evidences some care in balancing community order with the right of free discussion of matters of public concern.

Nor is our statute of the sort declared unconstitutional in *Cantwell* v. *Connecticut*, 310 U. S. 296. There the asserted offense was the soliciting of funds for religious purposes (by the sale of literature) without a permit. With the consent of two Roman Catholics in the street, the defendant played a phonograph record which turned out to be a criticism of the hearers' religion. The hearers were incensed. A breach of the peace might have occurred unless the defendant had withdrawn at request. "There was no evidence that he (the defendant) was personally offensive or entered into any argument with those he interviewed." The state court held that the charge was "not assault or breach of the peace or threats on Cantwell's part, but invoking or inciting others to break the peace, and that the facts supported the conviction of that offense." It resulted that the case involved the right to express opinion without the informant doing a single act of violence, without committing a breach of the peace, without either threat or offensive remark.

Mr. Justice Roberts pointed out that freedom to believe and freedom to act are both secured by the due process clause of the Fourteenth Amendment. "The first is absolute, but in the nature of things, the second cannot be. Conduct remains subject to regulation for the protection of society." While the state may not wholly deny the right to disseminate views which may inv-olably be held, it may [fol. 51] by general and non-discriminatory legislation regulate the times and places and the manner of conduct of the disseminator upon the streets, "and may in other respects safeguard the peace, good order and comfort of the community, without unconstitutionally invading the liberties protected by the Fourteenth Amendment." The test suggested was whether the alleged protection of the state's interest has been pressed "to a point where it has come into fatal collision with the overriding interest protected by the federal compact." So tested, the Connecticut statute, which left to the licensing officer the decision whether a cause was religious or not, was declared unconstitutional as involving previous restraint by way of censorship and not directed at the conduct of the disseminator of opinions.

In the course of discussion, Mr. Justice Roberts remarked upon permissible restraints of conduct. "The offense known as breach of the peace embraces * * * not only violent acts but acts and words likely to produce violence in others. * * * When * * * immediate threat to public safety, peace, or order, appears, the power of the state to prevent or punish is obvious." Such a breach of the peace by Cantwell, the state court had held, did not exist. "One may, however, be guilty of the offense if he commit acts or make statements likely to provoke violence and disturbance of good order, even though no such eventuality be intended. Decisions to this effect are many, but examination discloses that, in practically all, the provocative language which was held to amount to a breach of the peace consisted of profane, indecent, or abusive remarks directed to the person of the hearer. Resort to [fol. 52] epithets or personal abuse is not in any proper sense communication of information or opinion safeguarded by the Constitution, and its punishment as a criminal act would raise no question under that instrument (the Federal Constitution)".

In our opinion the statute under which Chaplinsky was convicted of a breach of the peace is not rendered invalid by the fact that it placed his conduct under such restraint as it did, and provided a penalty for it. *Milk Wagon Drivers Union* v. *Dairies,* United States Supreme Court, October Term 194 , No. 1.

The defendant further says that our statute is invalid because it is so vague and indefinite that one coming within its purview may not know what is prohibited. In this connection, the claim is made that the test of what is offensive is purely subjective in the sense that it is to be determined by the way the addressee reacts to it. The defendant therefore argues that nobody can know what is offensive language, since one man may be offended by words to which another man would take no exception. We have never construed the statute by any such test. The word "offensive" is not to be defined in terms of what a particular addressee thinks. The legislature had no such vague, shifting test in mind. As was long ago said, they had in mind the tendency of words, not their actual result. The analogy was that of the distinction between civil and criminal libel. *State* v. *Brown,* 68 N. H. 200.

The test is what men of common intelligence would understand would be words likely to cause an average addressee to fight. We have never applied the statute otherwise. The [fol. 53] English language has a number of words and expressions which by general consent are "fighting words" when said without a disarming smile. In common understanding they are offensive in the Websterian sense of being such as to cause resentment, or, as Funk and Wagnalls say perhaps more aptly, adapted to give offense, offense being that which causes anger. Such words, as ordinary men know, are likely to cause a fight. So are threatening, profane or obscene revilings. Derisive and annoying words can be taken as coming within the purview of the statute as heretofore interpreted only when they have this characteristic of plainly tending to excite the addressee to a breach of the peace. If the time may ever come when the words "damned Fascist" will cease to be generally regarded as "fighting words" when applied face-to-face to an average American, this is not the time. The presiding justice might have been warranted in telling the jury that they were offensive as a matter of law. But since he thought the jury as competent as he to understand the words, he left the question to them.

The statute, as construed, does no more than prohibit the face-to-face words plainly likely to cause a breach of the peace by the addressee, words whose speaking constitute a breach of the peace by the speaker—including "classical fighting words", words in current use less "classical" but equally likely to cause violence, and other disorderly words, including profanity, obscenity and threats. Men of common intelligence, situated as was Chaplinsky do not need to guess at its meaning or differ as to its application. See *Connally* v. *Company*, 269 U. S. 385, 391. If the de- [fol. 54] fendant or others might have guessed that less than such words were prohibited, or if they might have differed about what other words, if any, came under the ban, it was open to all to know, as we have heretofore held, that it could not apply except to words likely to cause a breach of the peace when addressed to an individual in a public place. Within the ambit of the statute, one does not need to guess at what is prohibited, for all men of common intelligence know almost instinctively what are the dangerous words when so addressed.

The holding of this statute as sufficiently definite is believed to be consistent with the decisions in *Stromberg* v. *California*, 283 U. S. 359, 369 (where the construction given included in the prohibition a fair use of constitutional freedom), in *Herndon* v. *Lowry*, 301 U. S. 242 (where defendants were obliged to exercise the gift of prophecy in order to know the application of the statute), in *Lanzetta* v. *New Jersey*, 306 U. S. 451 (where the defendant did not have the benefit of a permissible construction prior to the act with which he was charged), and in *Thornhill* v. *Alabama*, 310 U. S. 88 (where the prohibition extended to the use of words "without annoyance or threat of any kind").

The words "offensive", "derisive" and "annoying", in this connection of tendency to disorder in public places, are commonly used and commonly understood. They are not wanting in meaning. Some are used in statements of legal principles by those who are careful of accuracy and definiteness of statement. Thus, "personally offensive" language, "profane, indecent or abusive remarks directed to the person of the hearer", and "epithets or personal abuse", all of which are caught up in the phrase "words [fol. 55] likely to produce violence in others." *Cantwell* v. *Connecticut, supra.* Though general in a sense, such words have commonly accepted popular and legal significance. When one speaks of publicizing "without annoyance or threat of any kind" (*Thornhill* v. *Alabama, supra*) he is not to be misunderstood, even though "without just or legal excuse" are words without ascertainable meaning. And so reference to an injunction prohibiting officials from interfering with the right of speakers "in an orderly and peaceable manner" is definite, because everybody understands what "orderly and peaceable" means. *Hague* v. *C. I. O.*, 307 U. S. 496, 517. Likewise, any intelligent person may understand the prohibition of our statute as it has always been construed. Equally clear is the phrase "matter obscene or offensive to public morals", or the phrase "disorderly conduct" (*Lovell* v. *Griffin*, 303 U. S. 444).

Finally, no person situated as was Chaplinsky, is left in any forbidden sense to guess what a jury will guess. Neither he nor the jury is faced with uncertainty in any other sense than would be the case if the charge were

negligent conduct, where the test is that of average conduct or gross negligence. Our statute deals "with the actual, not with an imaginary condition other than the facts." *International Harvester Company*, 234 U. S. 217, 223. And it deals with those facts upon the basis of tendencies of words used face-to-face in public places which are matters of common knowledge and appreciation.

Exceptions overruled.

All concurred.

[fols. 56-57] In Supreme Court of New Hampshire

[Title omitted]

Docket Entries

Strafford: From Sept. T. '40 (Superior Court) Entered Dec. 4, '40.

Feb. 4, '41. On hearing, motion for stay of execution granted as to clause 7.

Mar. 4, '41. Page, J. Exceptions overruled.

Mar. 7, '41. Execution stayed for 90 days.

June 3, '41. Order allowing appeal to U. S. Supreme Court signed.

[fol. 58] United States Supreme Court, October Term, 1941

[Title omitted]

Petition for Appeal, Assignments of Error and Prayer for Reversal

Petition for Appeal

Considering himself aggrieved by the final decision of the New Hampshire Supreme Court in the above entitled cause, the appellant therein, Walter Chaplinsky, hereby prays that an appeal be allowed to the Supreme Court of the United States herein, and for an order fixing the amount of the bond thereon.

Statement

This case is one in which the validity of a statute of the State of New Hampshire, to wit,

Chapter 378, section 2 (page 1470), Public Laws of the State of New Hampshire, which reads:

"No person shall address any offensive, derisive, or annoying word to any other person who is lawfully in the street or other public place, nor call him by any offensive [fol. 59] or derisive name, nor make any noise or exclamation in his presence and hearing with intent to deride, annoy, or offend him or prevent him from pursuing his lawful business or occupation."

which statute was passed and approved by the Legislature of the State of New Hampshire, is drawn in question upon the ground that said statute is repugnant to Section 1 of the Fourteenth Amendment to the Constitution of the United States. The final decision of the Supreme Court in the last resort in all causes in the State of New Hampshire in which a decision could be had, is in favor of the validity of said statute. Therefore in accordance with the rules of the Supreme Court of the United States (Rule 46, paragraph 2 [28 U. S. C., sec. 354]), the appellant respectfully shows this Court that the case is one in which under the legislation in force when the Act of January 31, 1928 (45 Stat. L. 54) was passed, to wit, under Section 237 (a) of the Judicial Code (28 U. S. C., sec. 344), a review could be had in the Supreme Court of the United States on a writ of error as a matter of right.

The said Supreme Court in the last resort in all causes in the State of New Hampshire rendered its decision herein on the 4th day of March 1941, by overruling defendant's exceptions and thereby affirming the judgment of the Superior Court for Strafford County, State of New Hampshire. The opinion of the said Supreme Court of New Hampshire [fol. 60] has not yet been officially reported but is of record unofficially in State v. Walter Chaplinsky et al., — A. (2) —. The order of affirmance by the New Hampshire Supreme Court entered in the office of the Clerk of said Court on March 4, 1941 became a final judgment on that date.

Assignments of Error

Now comes the appellant in the above cause and files herewith, together with his petition for appeal, these as-

signments of error and says that there are errors committed by the court below in the record and proceedings of the above entitled cause, and for the purpose of having the same reviewed in the United States Supreme Court, makes the following assignments:

First. The New Hampshire Supreme Court committed reversible error in failing to hold that Public Law chapter 378 section 2 is invalid and void on its face and as construed and applied because it is repugnant to the due process clause of the Fourteenth Amendment in that it unreasonably restricts freedom of speech and freedom of press, contrary to the Fourteenth Amendment to the United States Constitution.

Second. The New Hampshire Supreme Court committed reversible error in failing to hold that Public Law chapter 378 section 2 is invalid and void on its face by reason of the fact that it is so vague, indefinite, uncertain, and ambigu- [fol. 61] ous that it fails to set a reasonable standard of guilt and is therefore violative of the due process clause of the Fourteenth Amendment to the Constitution of the United States.

Third. The New Hampshire Supreme Court committed reversible error in failing to hold that Public Law chapter 378 section 2 is invalid and void on its face by reason of the fact that it is an unreasonable exercise of the police power in that it allows and places no restrictions upon arbitrary discrimination and is thus violative of the due process clause of the Fourteenth Amendment to the Constitution of the United States.

Fourth. The New Hampshire Supreme Court committed reversible error in failing to hold that the undisputed evidence showed that the defendant was not guilty of violating Public Law chapter 378 section 2.

Fifth. The New Hampshire Supreme Court committed reversible error in failing to hold that evidence of circumstances of provocation, justification, or mitigation offered by defendant is admissible in a trial for violation of Public Law chapter 378, section 2.

Prayer for Reversal

For and on account of the above errors the appellant, Walter Chaplinsky, prays that the said judgment of the

New Hampshire Supreme Court hereinbefore described in [fols. 62-63] the above entitled cause be reviewed by the Supreme Court of the United States and reversed, and a judgment rendered in favor of appellant, and for his costs.

Joseph F. Rutherford, Hayden Covington, Attorneys for Appellant.

[fol. 64] UNITED STATES SUPREME COURT

[Title omitted]

ORDER ALLOWING APPEAL—June 3, 1941

Appellant in the above entitled cause has prayed for allowance of an appeal in this cause to the Supreme Court of the United States from the judgment made and entered in the above entitled cause by the New Hampshire Supreme Court on the 4th day of March 1941.

It appearing that the appellant in his Brief filed originally in this cause before hearing attacked the statute in question on the grounds, as contended by him that it unreasonably deprives him of freedom of speech and freedom of press, and that it is void because discriminatory, vague and indefinite; all of which contentions were overruled by decision and judgment of the New Hampshire Supreme Court previously rendered herein.

And it appearing that appellant has presented and filed his petition for appeal to the Supreme Court of the United [fol. 65] States, a statement, assignments of error and prayer for reversal and jurisdictional statement, all within ninety (90) days from date of said final judgment of the New Hampshire Supreme Court, pursuant to the statutes and the rules of the Supreme Court of the United States in such case made and provided,

It is now here ordered that an appeal be and the same is hereby allowed to the Supreme Court of the United States from the New Hampshire Supreme Court in the above entitled cause as provided by law, and

It is further ordered that the Clerk of the New Hampshire Supreme Court shall prepare and certify a transcript of the record, proceedings and judgment in the above cause and transmit the same to the Supreme Court of the United

States so that he shall have the same in said Court within thirty (30) days from date.

And it is further ordered that security for costs on appeal be fixed in the sum of Five hundred Dollars ($500.00).

Dated, June 3rd, 1941.

John E. Allen, Chief Justice of the New Hampshire Supreme Court.

[fols. 66-69] Cost Bond on appeal for $500 omitted in printing.

[fols. 70-72] Citation in usual form omitted in printing.

[fol. 73] UNITED STATES SUPREME COURT

October Term, 1941

[Title omitted]

STATEMENT OF POINTS TO BE RELIED UPON—Filed July 10, 1941

Comes now appellant in the above-entitled cause and states that the points upon which he intends to rely in this Court in this case are as follows:

Point 1. The statute of the State of New Hampshire, to wit, Public Law chapter 378, section 2, is invalid and void on its face and as construed and applied, because it is repugnant to the due process clause of the Fourteenth Amendment to the United States Constitution in that it unreasonably restricts freedom of speech and freedom of press, contrary to the Fourteenth Amendment.

Point 2. The statute hereinbefore mentioned is invalid and void on its face by reason of the fact that it is so vague, indefinite, uncertain, and ambiguous that it fails to set a reasonable standard of guilt and is therefore violative of the due process clause of the Fourteenth Amendment to the Constitution of the United States.

[fols. 74-75] Point 3. The statute hereinbefore mentioned is invalid and void on its face by reason of the fact that it is an unreasonable exercise of the police power in that it allows and places no restrictions upon arbitrary discrimination and is thus violative of the due process clause of the Fourteenth Amendment to the Constitution of the United States.

Point 4. The undisputed evidence showed that the defendant was not guilty of violation of the statute hereinbefore mentioned.

Point 5. Evidence of circumstances of provocation, justification, or mitigation offered by the defendant is admissible in a trial for violation of the statute hereinbefore mentioned.

Joseph F. Rutherford, Hayden Covington, Attorneys for Appellant.

[fol. 76] UNITED STATES SUPREME COURT

October Term, 1941

[Title omitted]

STIPULATION—Filed July 10, 1941

Whereas appeal was duly taken by appellant from conviction under the complaint;

Whereas on the 4th day of March, 1941, the New Hampshire Supreme Court affirmed the conviction aforesaid;

Whereas appellant has filed petition for appeal to the Supreme Court of the United States, assignments of error and prayer for reversal and jurisdictional statement with the Clerk of the New Hampshire Supreme Court within ninety (90) days from March 4, 1941, the date of entry of aforementioned judgment affirming the conviction, and the Chief Justice of said New Hampshire Supreme Court having signed an order granting said appeal; and within five (5) days after said allowance of appeal copies of the petition for appeal, order allowing appeal, copy of appeal bond, of assignments of error, jurisdictional statement, statement of points to be relied upon and statement directing

[fol. 77] attention of appellee's counsel to provisions of paragraph 3 of Rule 12 of the Supreme Court of the United States, together with copy of citation, having been duly served upon appellee's counsel;

Whereas appellant having filed a bond to cover costs of appeal to the Supreme Court of the United States in the amount of Five hundred dollars, and it is agreed that such bond shall continue in effect pending final action herein by the United States Supreme Court;

It is agreed between the parties that as the parts of the record to be sent by the Clerk of the New Hampshire Supreme Court to the Clerk of the Supreme Court of the United States to be filed and printed by the Clerk of the United States Supreme Court, the following shall be and are provided, to wit:

1) Record printed and now on file with the New Hampshire Supreme Court.

2) Docket entry of judgment of New Hampshire Supreme Court rendered on March 4, 1941.

3) Opinion of the New Hampshire Supreme Court.

4) Judgment.

5) Petition for appeal to the Supreme Court of the United States.

6) Order allowing appeal.

7) Assignments of error.

[fol. 78] 8) Prayer for reversal.

9) Statement of points to be relied upon.

10) Statement as to jurisdiction.

11) Stipulation of counsel.

12) All exhibits identified by stenographer.

Signed on this 3rd day of June, 1941.

Joseph F. Rutherford, Hayden Covington, Attorneys for Appellant; Hayden Covington, Frank R. Kenison, Attorneys for Appellee.

This is to acknowledge that I, as Counsel for Appellee, have received the above-named twelve (12) documents

described in the foregoing stipulation, on this third day of June, 1941.

Frank R. Kenison for Appellee.

Endorsed on cover: Enter Hayden Covington. File No. 45,583, New Hampshire Supreme Court, Term No. 255. Walter Chaplinsky, Appellant, vs. State of New Hampshire. Filed July 10, 1941. Term No. 255 O. T. 1941.

(7175)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No. 255

WALTER CHAPLINSKY,

Appellant,

vs.

STATE OF NEW HAMPSHIRE.

APPEAL FROM THE SUPREME COURT OF THE STATE OF NEW HAMPSHIRE.

STATEMENT AS TO JURISDICTION.

JOSEPH F. RUTHERFORD,
HAYDEN COVINGTON,
Counsel for Appellant.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No. 255

WALTER CHAPLINSKY,

Appellant,

vs.

STATE OF NEW HAMPSHIRE,

Appellee.

APPEAL FROM NEW HAMPSHIRE SUPREME COURT.

JURISDICTIONAL STATEMENT.

Jurisdiction of the Supreme Court of the United States is invoked under Section 237 (a) of the Judicial Code [28 U. S. C. 344 (a)].

Under the Act of Congress of January 31, 1928, Chapter 14, 45 Stat. 54, and under the Act of Congress of April 26, 1928, Chapter 440, 45 Stat. 466, an appeal may be taken in any case which under prior statute could be received as a matter of right on writ of error.

New Hampshire Statute Drawn in Question.

The statute, the constitutionality and validity of which as construed and applied to appellant is here drawn in question, is Chapter 378, section 2 (page 1470), Public Laws of the State of New Hampshire, which reads as follows:

> "No person shall address any offensive, derisive, or annoying word to any other person who is lawfully in the street or other public place, nor call him by any offensive or derisive name, nor make any noise or exclamation in his presence and hearing with intent to deride, annoy, or offend him or prevent him from pursuing his lawful business or occupation."

The New Hampshire Supreme Court and the courts below held that the statute was not unconstitutional and that it did not abridge appellant's freedom of speech and freedom of press, in violation of the Fourteenth Amendment to the Federal Constitution. Accordingly, that court sustained the statute's application to appellant's acts and decided in favor of validity of the statute and held it to be constitutional as applied to appellant.

Timeliness.

The judgment of the New Hampshire Supreme Court was entered on March 4, 1941 (R. —). The opinion of that court was delivered on the same date and appears in the Record, p. — *et seq.* The judgment of the New Hampshire Supreme Court became final on March 4, 1941, the date of the opinion. The petition for appeal is duly filed and presented within ninety (90) days from such date to this Court and is therefore timely.

Statement of Nature of Case.

The appellant, Walter Chaplinsky, on the afternoon of Saturday, April 6, 1940, was standing and walking back

and forth on the sidewalk of the corner of North Main Street at Central Square in the City of Rochester. He was selling and offering for sale Biblical literature entitled "Watchtower", "Consolation" and others, and announcing his pamphlets. Appellant is an ordained minister of Jehovah God and is one of Jehovah's Witnesses and possessing credentials attesting to such fact.

While appellant was engaged in this work he was assaulted by a man who was accompanied by a police official, in the presence of such official, and the police official refused to arrest the man upon appellant's request. A few minutes later appellant was set upon and beaten by a mob. Appellant testified that police officials joined in with the mob. The police denied this in their testimony. The police intervened and started to take the appellant, on foot, to the police station located in the City Hall about a block away. While on the way to the City Hall and while on Wakefield Street, a public street, the appellant testified that he was very excited as he had just received about seven to ten punches and that he was being roughly handled by the police; that he asked the City Marshal, "Why don't you arrest the ones who started this fight?" to which the Marshal replied, "Shut up, you damn bastard and come along." Thereupon appellant said, "You are a damn fascist and a racketeer." The appellant testified that about a minute later when they who were together arrived just outside the City Hall he recognized a man who had previously struck him. The appellant said to that man, "Who are you?" The man replied, "I am a Deputy Sheriff." The appellant then said, "If you are a Deputy Sheriff this city's officials of Rochester are fascists."

The police testifying for the State denied ever having struck the appellant or participating with the mob, or addressing the appellant with profane language, or handling him roughly, or doing anything which may have reasonably

provoked the appellant. All the prosecution witnesses testified that the appellant made the exact statements attributed to him in the complaint.

Defendant (appellant here) was originally prosecuted in the Municipal Court of the City of Rochester by warrant and complaint, which reads as follows:

> "County of Strafford, aforesaid, with force and arms, in a certain public place in said city of Rochester, to wit, on the public sidewalk on the easterly side of Wakefield Street, near unto the entrance of the City Hall, did unlawfully repeat, the words following, addressed to the complainant, that is to say, 'you are a God damned racketeer' and 'a damned Fascist and the whole government of Rochester are Fascists or agents of Fascists' the same being offensive, derisive and annoying words and names."

He was convicted and duly appealed to the Superior Court. Thereafter his case was tried *de novo* in the Superior Court at Dover, New Hampshire, before a jury which resulted in a verdict of guilty. Thereafter the defendant was sentenced to six months in the State prison.

At the conclusion of the State's case and of the entire case, appellant filed a motion to dismiss the complaint and for his discharge, upon grounds therein stated (R. —). That motion was overruled by the court and exception allowed to appellant. As grounds for such motion the appellant contended that the statute as construed and applied to him was invalid and void because it is in conflict with the United States Constitution, Fourteenth Amendment, Section 1, in that as so construed and applied it unlawfully deprives appellant of his rights of freedom of speech and freedom of press. As further ground appellant contended in the motion that the statute is void on its face because of vagueness, indefiniteness and the delegating of arbitrary discretion and discriminatory powers to the police. It was

further contended in the motion that the evidence failed to show appellant guilty.

Bill of exceptions covering all the points here urged was duly allowed by the trial judge, and the case was taken to the New Hampshire Supreme Court on such bill of exceptions (R. —). The case was timely appealed to that court and duly docketed; and was thereafter argued at the February Term, 1941.

In the above matter *substantial Federal questions* attacking the validity of the statute were raised in the trial court by motions to dismiss at various stages of the proceedings as set forth above, on the ground that as construed and applied to appellant, and on its face, the statute is invalid because it is in conflict with the United States Constitution, Fourteenth Amendment, Section 1, in that it unreasonably deprives appellant of freedom of speech and freedom of press. And, further, that such statute vests in the police arbitrary and discriminatory powers, and is vague and indefinite; thereby denying due process and equal protection of the laws in violation of the Federal Constitution, Fourteenth Amendment, Section 1 (R. —).

These points of law were overruled by the trial court, although duly and timely urged (R. —).

These Federal questions were carried forward and urged in the assignments of error, which were presented to the New Hampshire Supreme Court in the time and manner required by law (R. —).

The New Hampshire Supreme Court passed upon each of said Federal questions or assignments, attacking the validity of the statute as applied to appellant, and held the statute valid and constitutional, both on its face and as applied, and found that the Fourteenth Amendment to the United States Constitution was not violated. See Opinion, Appendix A.

The State Supreme Court sustained the conviction of appellant and affirmed the judgment of the trial court by overruling defendant's exceptions.

In the petition for appeal and the assignments of error filed with this statement, appellant complains of the judgment of the New Hampshire Supreme Court for and on account of each of the grounds set forth in his brief filed in said State court and which grounds are also set forth in the bill of exceptions duly approved by the trial court.

Grounds and Decisions Showing Substantial Federal Questions.

Appellant's contentions herein are that the statute drawn in question, as applied to his activity, is void in that it

A) deprives him of his right of freedom of speech and freedom of press, and therefore is invalid on its face and as construed and applied because it is repugnant to the due process clause of the Fourteenth Amendment to the United States Constitution;

B) is invalid and void on its face by reason of the fact that it is so vague, indefinite, uncertain and ambiguous that it fails to set a reasonable standard of guilt and is therefore violative of the due process clause of the Fourteenth Amendment to the Constitution of the United States;

C) is invalid and void on its face by reason of the fact that it is an unreasonable exercise of the police power in that it allows and places no restrictions upon arbitrary discrimination and is thus violative of the due process clause of the Fourteenth Amendment to the Constitution of the United States.

Points for Argument.

1. The statute of the State of New Hampshire, to wit, Public Law, chapter 378, section 2. is invalid and void on

its face and as construed and applied, because it is repugnant to the due process clause of the Fourteenth Amendment to the United States Constitution in that it unreasonably restricts freedom of speech and freedom of press, contrary to the Fourteenth Amendment.

2. The statute hereinbefore mentioned is invalid and void on its face by reason of the fact that it is so vague, indefinite, uncertain, and ambiguous that it fails to set a reasonable standard of guilt and is therefore violative of the due process clause of the Fourteenth Amendment to the Constitution of the United States.

3. The statute hereinbefore mentioned is invalid and void on its face by reason of the fact that it is an unreasonable exercise of the police power in that it allows and places no restrictions upon arbitrary discrimination and is thus violative of the due process clause of the Fourteenth Amendment to the Constitution of the United States.

4. The undisputed evidence showed that the defendant was not guilty of violation of the statute hereinbefore mentioned.

5. Evidence of circumstances of provocation, justification, or mitigation offered by the defendant is admissible in a trial for violation of the statute hereinbefore mentioned.

Argument.

It is now fundamentally established that freedom of speech and freedom of press are rights protected against state invasion under the due process clause of the Fourteenth Amendment.

De Jonge v. *Oregon*, 299 U. S. 353, 364.

The undisputed evidence shows that appellant, immediately prior to his unlawful and unjustified arrest, and also

during the time that he was unlawfully assaulted, was engaged in the exercise of his right of freedom of worshiping Almighty God and freedom of press, in distributing the "Watchtower" and "Consolation" magazines. He had done no wrong and had not acted in an offensive way whatsoever. The mob had gathered about him, with the knowledge and consent of the police, had threatened to get and did get an American flag, placed it before him and commanded him arbitrarily to salute it, and upon his refusal he was assaulted and beaten.

He had every reason to expect police protection, but was given none. On the contrary, the police without any reason whatsoever jumped upon him and arrested him without excuse.

The facts made the basis of this particular charge occurred while the defendant was under arrest and in the custody of officers.

At the outset we should like to call the Court's attention that the words here employed are not personal abuse, such as are described in the case of *Cantwell* v. *Connecticut*, 310 U. S. 296, as follows:

> "Cantwell's conduct, in the view of the court below, considered apart from the effect of his communication upon his hearers, did not amount to a breach of the peace. One may, however, be guilty of the offense if he commit acts or make statements likely to provoke violence and disturbance of good order, even though no such eventuality be intended. Decisions to this effect are many, but *examination discloses that, in practically all, the provocative language* which was held to amount to a breach of the peace *consisted of profane, indecent, or abusive remarks directed to the person of the hearer.* Resort to epithets or *personal abuse* is not in any proper sense communication of information or opinion safeguarded by the Constitution, and its punishment as a criminal act would raise no question under that instrument."

Wrongful Oppression openly practiced, as here, by citizens in the presence of and with the consent of public officers is Rightly subject to open and prompt Condemnation by the one against whom such wrongful acts are performed. Earnestly and in good faith this contention and the following argument appellant submits for unbiased consideration.

Appellant's use of the word "damned" is, in these circumstances, not a violation of the statute. Here the use of that word served only to emphasize, to arouse to a realization of the wrongfulness of the course then being pursued by those thus spoken to.

The question of whether or not the complaining witness was a *racketeer* is a matter of opinion which, under the evidence, was fitly and timely expressed. The evidence shows that the complaining witness, a public officer, openly permitted a mob to attack the defendant and when the defendant *rightly* attempted to defend himself the complaining witness arrested him, beat and abused him. Let the Court ponder!

The only reason the mob gathered against the defendant, and the only reason the defendant was arrested, was on account of the fact that he was one of Jehovah's witnesses distributing literature disliked by the complaining witness and mobsters. Let this be clearly and fittingly emphasized in the consideration of defendant's position in the circumstances. Let it be borne in mind that at the time of the wrongful assault upon him he was upon a public street, where he had a right to be, and where he was lawfully doing in a peaceful manner that which he had a right to do, namely, imparting his views to others In Their Interest, as he sincerely believed. There is no showing that his *personal* deportment was noisy, truculent, overbearing or offensive. Defendant's right to distribute literature is guaranteed by the Constitution.

On the other hand, there is evidence that the complaining witness conspired with the mobsters in violation of Sections 51 and 52, Title 18, United States Code, to deprive the defendant of this right. One thus acting, in the opinion of the defendant, could be properly termed a "racketeer". Jehovah God has condemned racketeers and hence the expression "God damned", if, as and when used in such circumstances, imports verity or constitutes a simple definition of fact. The right to use such definitive and descriptive language in a proper manner and time is guaranteed by the Constitution regardless of whether the one so described agreed or not.

This same argument applies to the words "damned fascist", and the words "the whole government of Rochester are fascists or agents of fascists". Use of the word "fascist" is not derisive, and does not accuse the complaining witness of being an Italian or a follower of Benito Mussolini. The word "fascist" is now an English word which in common parlance means one who employs methods and acts in a manner so as to deprive another of his constitutionally secured rights, by misapplying laws or otherwise conspiring to deprive another of such rights, contrary to the Federal Constitution and its fundamental principles of freedom.

The acts of the complaining witness and his mobster allies constituted "fascist" action.

The defendant had the right to criticize the complaining witness as a public official openly acting in a wrongful manner, and also to criticize the local municipal government by the use of any language that he desired to employ as long as he did not induce or ask others to use violence against the local municipal government to overthrow the same. It is admitted by all that he did not attempt to overthrow the government but was criticizing the local government and its agents, which he had a right to do.

It is to be noted that the statute prohibits the use of "offensive and annoying words" to another on the street or in a public place with intent to annoy or offend him, and such statute is not confined to slanderous and libelous statements but extends to prohibit one from speaking *the truth* in the presence of another. Webster defines the words of this statute as follows:

> *Derisive*—Expressing, serving for, or characterized by derision. Derision—to scornfully deride, act of deriding, contempt.
>
> *Annoying*—That annoys; molesting, vexatious.
>
> *Offensive*—Making attack; pertinent to, or characterized by, offense or attack, assailant; aggressive; hence, fitted for, or used in, attacking.
>
> Giving pain or unpleasant sensations; obnoxious; revolting; as an offensive smell; offensive sound.
>
> Giving offense, causing, or such as to cause, displeasure or resentment; insulting; as offensive words.
>
> Obs. *a* causing injury or damage; harmful, injurious.
>
> *b* of the nature of an offense, sin or transgression; offending or tending to offend; transgressive.
>
> *c* productive of spiritual stumbling.

This statute is attacked as being void on its face, for the reason that it is vague and indefinite and also because on its face it deprives every one of the right of freedom of speech, contrary to the Fourteenth Amendment.

There are two methods of testing constitutionality. One method is to apply the statute to the facts and then test for constitutionality as applied to those facts. The other method is to determine whether the statute is void on its face and therefore making any complaint issuing under it also void. The court should not consider the complaint or evidence as shown by the record in testing validity if the statute is void on its face.

> "Where regulations of the liberty of free discussions are concerned, there are special reasons for observing

> the rule that it is the statute, and not the accusation nor the evidence under it, which prescribes the limits of permissible conduct and warns against transgressions." *Thornhill* v. *Alabama*, 310 U. S. 88.

The statute is also void *as applied*. To apply it to the activities of the defendant-appellant and to convict him on the evidence is error and makes the statute as construed and applied to him unconstitutional and void under the "due process" clause of the Fourteenth Amendment to the United States Constitution because it abridges his rights of free speech and free press, contrary to the provisions of the Federal Constitution.

Attention of the Court is drawn here to the fact that it is a fundamental proposition that if a statute constitutional on its face is applied to deprive and interfere with constitutionally secured rights, such as the undisputed evidence shows the defendant-appellant was exercising at the time of his arrest, then such statute becomes invalid.

In support of this proposition we refer the Court to *Concordia Fire Insurance Co.* v. *Illinois*, 292 U. S. 535, 545, where Mr. Justice Van Devanter said:

> "Whether a statute is valid or invalid under the equal protection clause of the Fourteenth Amendment often depends on how the statute is construed and applied. It may be valid when given a particular application and invalid when given another."

What do the words mean when surrounded by the terminology of the statute?

When is one guilty under this statute by the use of such words?

The words are so broad that they include almost any word. The *manner* of saying "Hello" may fall in that category. The *manner* of criticism of any act of a government official, criticism of an actor's performance, criticism of almost anything, might be offensive, annoying, or de-

risive; at least to the person to whom the remark, name, noise, or exclamation is addressed. If the criticism is written and handed to another in the street the writer would be subject to prosecution under this statute. If one man on the street tells another that he doesn't like him, or tells a "New Dealer" that he doesn't think Roosevelt should have been re-elected for a third term, or tells a policeman that the police officials of the city are inefficient, he may be and could be prosecuted under this statute, and everyone admits that such is prohibited by the Constitution. Everything depends on how one says a thing and how the person to whom it is said takes it or interprets it, under this statute. Thus it becomes a dragnet enforceable at the whim of individuals.

The descriptive words of the statute are so broad that they would permit an enforcement of the statute to curb, suppress and censor honest criticism of government, religion, politics, social functions, or any other subject. *The statute covers equally lawful and unlawful words and conduct and makes no distinction.*

It does not confine itself to immoral, indecent, obscene, or profane words. THE FAILURE THUS TO DO MAKES IT UNCONSTITUTIONAL.

It prevents free communication of thoughts, ideas, information, and opinion merely because they might offend, annoy, or deride another.

The words "offensive, derisive, annoying", "deride, annoy, offend" and "prevent him from pursuing his lawful business or occupation" take on a very vague, indefinite and uncertain meaning as used in Public Law, chapter 378, section 2.

No man of ordinary intelligence can safely discern from this statute just what he can say, or what words he may use in addressing another in the street or other public place. Almost anything that is said can be taken to be de-

risive under this statute, depending upon the susceptibilities of the hearer. Strikers or pickets may use some word, express some opinion which they had a right to say and which, even though said innocently and with good intention, can be interpreted by some as having been said with intent to prevent a man from pursuing his lawful business or occupation. For example, a picket may say to a salesman entering the store or establishment being picketed, "Don't sell A. He is unfair to labor." For such remark the spokesman may be and can be prosecuted and convicted under this statute.

Public Law, chapter 378, section 2, is not aimed at any inherent danger in any and every word, exclamation, name or remark which may be addressed to another in a street or public place with intent to deride, offend, or annoy, or prevent him from pursuing his lawful business or occupation. Under the statute it is possible that a man may without intent to deride, offend, or annoy address profane language to another in the street. The individual to whom it is addressed may or may not take it in jest. Others in the vicinity may be offended to the extent that a breach of the peace may ensue. The statute is not specifically directed at any inherent, clear, present danger of destruction to life or property and when the interest that the statute seeks to protect is balanced against the interests of the individual and community in the rights of free speech, free press, and free worship it cannot be found to be warrantable.

Thornhill v. *Alabama, supra;*
Cantwell v. *Connecticut, supra;*
Schneider v. *State*, 308 U. S. 147;
Lovell v. *City of Griffin*, 303 U. S. 444;
Hague v. *C. I. O., et al.*, 307 U. S. 496.

See opinion of Holmes, J., in
Schenck v. *United States*, 249 U. S. 52;
Abrams v. *United States*, 250 U. S. 630.

As has been shown the terminology is so vague and indefinite that it is difficult to say just what is meant. It gives ample leeway for those who may be in control to so enforce a statute like this with such arbitrary and harsh discrimination that all free discussion can be curtailed by fear of prosecution. The threat inherent in such arbitrary measures is equally as evil as the threat of license or censorship.

The New Hampshire Supreme Court admits that the statute prohibits even truthful utterances, which shows that it has been construed to prohibit freedom of speech.

> "Since the statute makes no distinction between truthful and untruthful utterances, it was held that the justification was inadmissible. • • • Chaplinsky could no more defend unlawful speech on the ground of provocation than could one of the street-crowd have defended a charge of calling Chaplinsky names on the ground that the name-caller had been incensed by Chaplinsky's teachings."

It is to be noted from the above that the court holds that evidence of provocation and justification was inadmissible. We have made complaint against the action of the courts below in holding that provocation and justification for the use of the words in question were inadmissible. See Point 5 of "Points for Argument", page 9, *supra*, and its equivalent in appellant's "Statement of Points to Be Relied Upon".

A statute which makes one guilty of an offense even though the challenged utterance be clearly justifiable is in derogation of the right of speech. The New Hampshire Supreme Court says that speech is limited to words that would directly tend to cause violence. That court said:

> "• • • to the extent that no words were forbidden except such as have a direct tendency to cause acts of violence by the person to whom, individually, the remark is addressed."

This rule is contrary to the American rule expressed in the case of *Dearborn Publishing Co.* v. *Fitzgerald*, 271 Fed. 479, where it was said:

> "If it be assumed that the article might tend to excite others to breaches of the peace the reply is plain. It is the duty of all officials charged with preserving order and peace to suppress firmly and promptly all persons guilty of disturbing it, and not forbid innocent persons to exercise their lawful and equal rights. * * * If defendants' actions were sustained, the constitutional liberty of every citizen freely to speak, write and publish his sentiments on all subjects, being responsible only for abuse of that right, would be placed at the mercy of every public official who for the moment was clothed with authority to preserve the public peace and the right to a free press thus destroyed. * * *"

In support of the contention that the statute is contrary to the Fourteenth Amendment because denying freedom of speech and personal liberty without due process of law, we refer to:

22 Corpus Juris Secundum 71;
Detroit Creamery, et al., v. *Kinnan, et al.*, 264 Fed. 845;
Smith v. *Cahoun*, 283 U. S. 564;
Connally v. *General Constr. Co.*, 269 U. S. 391, 392;
Dials v. *Commonwealth*, 192 Ky. 440, 233 S. W. 888;

and *Small Co.* v. *American Sugar Ref. Co.*, 267 U. S. 233, where enforcement of a Federal statute was voided because of the fact that the statute was too vague, indefinite and indeterminate. It was a statute prohibiting excess profits on necessaries. The court cited the case of *United States* v. *Cohen Grocery Co.*, 255 U. S. 81, and *Weeds, Inc.* v. *United States*, 255 U. S. 109; and from the *Cohen Grocery* case quoted as follows:

> "Observe that the section forbids no specific or definite act. It confines the subject matter of the investiga-

tion which it authorizes (by court and jury after the act) to no element essentially inhering in the transaction as to which it provides. It leaves open, therefore, the widest conceivable inquiry, the scope of which no one can foresee and the result of which no one can foreshadow or adequately guard against."

See also *United States* v. *Brewer*, 139 U. S. 278; *Louisville & Nashville Ry. Co.* v. *Railroad Comm. of Tenn.*, 19 Fed. 679; *Louisville & Nashville Ry. Co.* v. *Commonwealth*, 99 Ky. 132, 35 S. W. 129.

The test is whether a statute defining an offense is void for uncertainty—whether the language may apply not only to a particular act about which there can be little or no difference of opinion, but equally to other acts about which there may be radical differences, thereby devolving upon the court the exercise of arbitrary power of discriminating between the several classes of acts. *Czarra* v. *Dist. of Columbia Med. Supervisors*, 25 App. (D. C.) 443.

The dividing line between what is lawful and what is unlawful cannot be left to conjecture. *United States* v. *Capital Traction Co.*, 34 App. (D. C.) 592.

This general principle was applied in *Ex parte Jackson*, 45 Ark. 158, 164, where the statute annulled made it a misdemeanor to "commit any act injurious to the public health or public morals, or to the perversion of public justice or the due administration of the laws".

The principle is clearly applicable here and the statute in question should be held void upon its face.

In *United States* v. *Ballard*, 12 Fed. Supp. 321, United States District Judge Hamilton, of the Western District of Kentucky, held unconstitutional the internal revenue law known as Section 275, Title 26 U. S. C. A., and made a very eloquent argument in our favor appearing at pages 324

through 326 of the opinion, a part of which is quoted as follows:

> "The crime must be created by the Act of Congress, alone, for the public are not required to look beyond the act in their endeavor to ascertain what is criminal, and the discretion of fixing what facts import criminality is exclusively that of the law makers as distinguished from the executive."

See also the case of *International Harvester Co.* v. *Commonwealth of Kentucky*, 234 U. S. 217, 221, in which Mr. Justice Holmes outlawed the anti-trust law of Kentucky, which made price-fixing *lawful*, unless for the purpose or with effect of fixing a price that was greater or less than the real value of the article.

In *Herndon* v. *Lowry*, 301 U. S. 242, the majority opinion by Mr. Justice Roberts states at p. 264, in reference to Georgia Penal Code, sec. 56 (Any attempt, by persuasion or otherwise, to induce others to join in any combined resistance to the lawful authority of the State shall constitute an attempt to incite insurrection):

> "The statute sets no reasonable standard of guilt. So vague and indeterminate are the boundaries thus set to the freedom of speech and assembly that the law necessarily violates the guarantees of liberty embodied in the Fourteenth Amendment."

In *Dirk De Jonge* v. *Oregon*, 299 U. S. 353, the statute in question (Any person who shall preside at or conduct or assist in conducting any assemblage of persons, of any organization, or any society, or any group which teaches or advocates the doctrine of criminal syndicalism or sabotage is guilty of a felony—Here the defendant spoke at a Communist meeting) was held to be so broad that it abridged the freedom of speech and of the press, and the right of peaceable assembly, and thus violated the due process clause of the Fourteenth Amendment.

In *Near* v. *Minnesota*, 283 U. S. 697, the Minnesota statute, Chap. 285, Session Laws of Minnesota 1925, provided:

> "Sec. 1. Any person who as an individual, or as a member or employee of a firm, or association or organization, or as an officer, director, member or employee of a corporation, shall be engaged in the business of regularly or customarily producing, publishing or circulating, having in possession, selling or giving away (a) an obscene, lewd and lascivious newspaper, magazine, or other periodical, or (b) a *malicious, scandalous* and defamatory newspaper, magazine or other periodical, is guilty of a nuisance, and all persons guilty of such nuisance may be enjoined as provided in the act."

The complaint there charged the defendant with printing a malicious, scandalous and defamatory newspaper. There was no question that the columns referred to in the complaint were malicious, scandalous and defamatory. The defendant alleged that the statute was unconstitutional as it abridged the right of freedom of the press as guaranteed in the Fourteenth Amendment, and that therefore the complaint since it issued under an invalid statute was void. *The court held the statute to be invalid and void on its face,* as it abridged the right of freedom of the press.

In *Stromberg* v. *California*, 283 U. S. 359, the California Penal Code sec. 403a prohibited the display of the red flag "as a sign, symbol or emblem of opposition to organized government". The complaint charged that the defendant did wilfully, unlawfully and feloniously display a red flag and banner in a public place and in a meeting place as a sign, symbol and emblem of opposition to organized government and as an invitation and stimulus to anarchistic actions and as an aid to propaganda that is and was of a seditious character." The defendant there was found guilty. The court held the statute invalid under the Fourteenth Amendment of the Constitution of the United States because it was so vague and indefinite and ambiguous as

to permit punishment for fair use of opportunity to advocate change of government, and that as such it was repugnant to the guarantee of liberty.

In *Lanzetta* v. *New Jersey*, 306 U. S. 451, the statute in question was New Jersey Laws of 1934 chapter 155, sec. 4. (Any person not engaged in any lawful occupation, known to be a member of any gang consisting of two or more persons, who has been convicted at least three times of being a disorderly person, or who has been convicted of any crime in this or in any other State is declared to be a gangster provided, however, that nothing in this section contained shall in any wise be construed to include any participant or sympathizer in any labor dispute.) The court held that the words "gang," "gangster," "known to be a member," and "any person not engaged in any lawful occupation" were so indefinite and ambiguous as to their meaning and as to the interpretation to be given that the statute constituted a violation of the due process clause of the Fourteenth Amendment and consequently was invalid on its face.

In *Atlantic Ref. Co.* v. *Trumbull*, 43 F. (2d) 154, 1930 Conn., a statute prohibiting sale of lubricating oil not "equal to or better in quality" than certain government specifications held invalid for indefiniteness.

Public Law chapter 378 section 2 when compared with the cases cited certainly falls in the same classification. This statute in effect allows prosecution for the expression of opinion and criticism, on any matter of public concern as well as private. It affords opportunity for a complete and thorough dictatorial censorship which can be imposed at the will of the power in control. It constitutes a grave danger to democracy.

The "intent" limitation in Public Law chapter 378 section 2 does not cure its defectiveness. (See argument at pages 16 through 19, *supra*.) In *Herndon* v. *Lowry*, *supra*, the intent which had to be shown could only be judged by

the "dangerous tendency" of the words uttered. The court held that "dangerous tendency" and words of the statute attempting to set a reasonable standard of guilt were so vague and uncertain that a jury would be warranted in a guilty finding even though the defendant's act may not have any effect for ten, twenty or thirty years. "Dangerous tendency" was not limited. The statute was held invalid and void.

Specification by an "intent" cannot cure vagueness and ambiguity.

In *Herndon* v. *Lowry, supra,* the Georgia Penal Code section 56, provided: "Any attempt, by persuasion or otherwise, to induce others to join in any combined resistance to the lawful authority of the State shall constitute an attempt to incite insurrection." In invalidating that statute the Court (by Mr. Justice Roberts) said:

> "The power of a state to abridge freedom of speech and of assembly is the exception rather than the rule and the penalizing even of utterance of a defined character must find its justification in a reasonable apprehension of danger to organized government. *The judgment of the legislature is not unfettered. The limitation upon individual liberty must have appropriate relation to the safety of the state. Legislation which goes beyond this need violates the principle of the constitution.*"

To permit this conviction to stand means the end of free speech and constitutional liberty in this country. Chaplinsky was engaged in a Christian work as an ordained minister of Jehovah God, peaceably and quietly standing on the street exhibiting literature to passersby. Because the message contained in the pamphlets and magazines was not suitable to the rabble element of Rochester, including members of the police department, a mob formed and gathered about him, threatening him with violence unless

he discontinued his work. He refused to discontinue, as well as refused to salute the flag, and was assaulted and beaten in the presence of the officers, who subsequently arrested him. Under all the facts and circumstances, Chaplinsky was justified in saying what he did say and such utterances were provoked by the police, one of whom participated in the mob.

Conclusion.

For sake of brevity, reference is here made to Petition for Appeal filed in this cause and we incorporate, by such reference, each and every assignment of error therein contained and hereby make the same a part hereof to show that *substantial Federal questions* were presented before the New Hampshire Supreme Court.

WHEREFORE the Supreme Court of the United States ought to note jurisdiction of this cause for final hearing in accordance with rules of this Court.

Respectfully submitted,

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Attorneys for Appellant.

APPENDIX "A".

Strafford No. 3226.

STATE

v.

WALTER CHAPLINSKY.

COMPLAINT, for violation of P. L., *c.* 378, *s.* 2. Trial by jury. Verdict of guilty. The defendant seasonably moved to quash on the ground that the statute is void under Article 6, Clause 2, and the First Amendment and Fourteenth Amendment (Section 2) of the Constitution of the United States. A motion to dismiss upon the same grounds was also seasonably made. Both motions were denied, and the defendant duly excepted. At the close of all the evidence, these motions were renewed and denied, subject to exception. The defendant further moved that a verdict be directed in his favor, assigning the same grounds and asserting that (1) the evidence, taken in the light most unfavorable to the defendant, failed to justify a finding of guilt, and (2) the words charged were not such as to come within the prohibition of the statute. The defendant also excepted to the exclusion of certain remarks of his counsel in the opening statement and to certain evidence. The material facts appear in the opinion. Transferred by *Burque*, C. J. on the defendant's bill of exceptions.

Frank R. Kenison, Attorney-General, *Ernest R. D'Amours*, Assistant Attorney General, and *John F. Beamis*, County Solicitor (*Mr. Kenison* orally), for the State.

Hayden Covington (of New York), *Alfred A. Albert* (of Massachusetts) and *Frank E. Blackburn* (*Mr. Covington* orally), for the defendant.

PAGE, J. The statute involved is P. L., *c.* 378, *s.* 2, which reads thus: "No person shall address any offensive, derisive or annoying word to any other person who is lawfully in any street or other public place, nor call him by any offensive or derisive name, nor make any noise or excla-

mation in his presence and hearing with intent to deride, offend or annoy him, or to prevent him from pursuing his lawful business or occupation."

The complaint is that Chaplinsky, being in the street at Rochester, addressed to the City Marshal these words: "You are a God damned racketeer" and "a damned Fascist and the whole government of Rochester are Fascists or agents of Fascists." These words were testified to by several of the State's witnesses. The defendant admitted the words with the exception of the qualifying "God."

The section of the statute involved has two provisions. The first relates to words and names applied by one directly to another in a public place. The second refers to noises or exclamations, possibly not directed to the person derided, but with the intent expressed. The two provisions are distinct. One may stand separately from the other. Assuming, without holding, that the second were unconstitutional, the first could stand if constitutional. *Woolf* v. *Fuller*, 87 N. H. 64, 69; *Rosenblum* v. *Griffin*, 89 N. H. 314, 320. Since the present case arises solely under the first provision, there is no need to consider either the construction or the constitutionality of the second. We shall not do so.

The provision now involved has twice been construed by this court. Nearly fifty years ago there was a conviction under it, in a case where the defendant, in the street, addressed to one also in the street the words "You are a God damned blackmailer." The defendant attempted to justify by proving the statement to be true. *a. Since the statute makes no distinction between truthful and untruthful utterances, it was held that the justification was inadmissible. b.* Construing the statute, this court said that its "purpose was to preserve the public peace. The direct tendency of such conduct, like that of [criminal] libel (4 Bl. Com. 150, 151), is to provoke the person against whom it is directed to acts of violence." *State* v. *Brown*, 68 N. H. 200. The decision seems to have assumed that the only intent required for conviction under the first part of the section was an intent to speak the words. In any event, that is the construction which we place upon the provision.

Again in 1900, the earlier construction was followed, and it was further held that the act applied where the words

were addressed by one to another in a public highway, even though no third person was present to hear the words. *State* v. *McConnell*, 70 N. H. 294. The complaining witness, a woman, was called a bitch, with other obscene words not thought necessary to be printed in the reported decision. 209 Briefs and Cases, 521.

It thus appears that long before the words for which Chaplinsky was convicted, the construction of the provision was made plain, *a. to the extent that no words were forbidden except such as have a direct tendency to cause acts of violence by the person to whom, individually, the remark is addressed. b.* This is not a case where, in advance of a judicial interpretation, the defendant could not be bound to understand what was intended by the statute. See *Lanzetta* v. *New Jersey*, 306 U. S. 451, 456.

Another point may be mentioned at once. The defendant asserts that the trial court improperly excluded evidence of, and comment on, the supposed provocation of Chaplinsky growing out of his prior treatment by the crowd. We think the ruling was correct.

The "provocative matter" was this. Chaplinsky was lawfully engaged, on the streets of Rochester, in the distribution of the literature of the sect known as Jehovah's Witnesses. Some of those on the streets apparently resented his activities. They may have thought them provocative. At least they complained to the City Marshal, who says he told them that Chaplinsky was lawfully engaged and that he must be left alone. At the same time the Marshal says he informed Chaplinsky that the crowd was getting restless and that he would better go slow. Some hours later, the crowd got out of hand and treated Chaplinsky with some violence. He was then led towards the police station, though apparently more for his protection than for arrest, since his arrest was definitely fixed only after he uttered the words charged, when the Marshal met him on the way. It may be remarked that nobody concerned, taking Chaplinsky at his word, used proper restraint on this occasion, but that fact, if true, could not be a defence of his own conduct.

At the moment the defendant uttered the words for which he was convicted, he undoubtedly felt resentment because

he had been roughly handled by the crowd. His resentment might well enough have extended to the police if they had failed to take any step reasonably within their power to control the crowd, or if they had failed to prosecute anybody who they had reasonable ground to believe had assailed him. But those facts, if true, would not have justified the offensive manner in which he sought to bring the Marshal to what Chaplinsky may have regarded as a sense of his duty. It was not useful or proper comment for bringing truth to light. Its plain tendency was to further breach of order, and it was itself a breach of the peace.

The excluded evidence related solely to Chaplinsky's recital of what he conceived was his mission to "preach the true facts of the situation of the Bible to the people," of "the Christian's permission", and of certain acts of the crowd that seem to have happened outside of the knowledge of the police. As to any possible provocation he had suffered while in the presence of the police, his testimony appears to have been admitted, though immaterial to the issue of his guilt. The court, in any event, was correct in excluding as immaterial the issues (1) whether the police had been neglectful prior to his offense, (2) whether the defendant had been assaulted by the crowd, and (3) whether, the defendant, in consequence, had been provoked to use the words with which he was charged. The defendant's argument as to this exclusion comes to this—that if he was provoked, the truth of his appellation of the Marshal could be established. The truth would be no justification. *State* v. *Brown, supra.*

The rule thus established is not severe. *c. Chaplinsky could no more defend unlawful speech on the ground of provocation than could one of the street-crowd have defended a charge of calling Chaplinsky names on the ground that the name-caller had been incensed by Chaplinsky's teachings. d.* The defendant was held to the same duties as those who disagreed with him or with whom he disagreed. The rules of fair conduct in public speech in the street apply indiscriminately to all—whether the speaker be a preacher, an official or a mere by-stander.

The defendant was not entitled to a directed verdict unless the statute is unconstitutional.

Upon the question of constitutionality, the defendant asserts infringement of the fundamental liberties of speech, press and worship. Since he did not print his words or circulate them in printed form, and since the words have no perceptible connection with worship or with freedom of religious belief or practice, we shall confine ourselves to the subject of free speech, though cognate rights may have illustrative effect in the course of this discussion.

The right to speak freely, whether in a street or elsewhere, is of primary importance. That is a principle whose general validity nobody denies, and nobody ought ever to deny. But the right may be limited in appropriate situations. The question is whether the limitation imposed by our statute is constitutionally permissible.

The fundamental basis of the constitutional rule is the necessity for full and free discussion of all subjects which affect ways of life, including religious, social and governmental questions. This is "essential to the very existence and perpetuity of free government." Cooley, Constitutional Limitations, 7th *ed.*, 596.

"No one can doubt the importance, in a free government, of a right to canvass the acts of public men and the tendency of public measures, to censure boldly the conduct of rulers, and to scrutinize closely the policy and plans of government. This is the great security of a free government. If we would preserve it, public opinion must be enlightened; political vigilance must be inculcated; free, but not licentious discussion must be encouraged. But the exercise of a right is essentially different from an abuse of it. The one is no legitimate inference from the other. Common sense here promulgates the board doctrine, *sic utere tuc, ut non alienum laedas;* so exercise your own freedom as not to infringe the rights of others, or the public peace and safety." Story, Constitution of the United States, *s.* 1888.

"Freedom of discussion, if it would fulfill its historic function in this nation, must embrace all issues about which information is needed or appropriate to enable the members of society to cope with the exigencies of their period." *Thornhill* v. *Alabama*, 310 U. S. 88.

If a city officer is guilty of a wrong or a neglect, any person is free to comment, to the end that free government may

be preserved. Peaceful and truthful discussion of matters of public interest cannot be penalized merely because others than the speaker may be persuaded of the truth of the criticism. "Abridgement of the liberty of such discussion can be justified only when the clear danger of substantive evils arises under circumstances affording no opportunity to test the merits of ideas by competition for acceptance in the market of public opinion." *Thornhill* v. *Alabama, supra.*

The only competition for acceptance in that market of opinion to be found in this record is this: the defendant admittedly called the Marshal a damned racketeer and Fascist, in exchange, as the defendant says, for the Marshal's calling him a damned bastard. Either appellation, applied directly to the other on the street, would clearly be a breach of the statute. Neither would rise above the level of name-calling. Neither party could expect the other to be persuaded by such language. Neither remark qualifies as peaceful and truthful discussion of matters of public interest. Each invited personal violence and disturbance of the peace, without any observable tendency to enable the bystanders to test the merits of the competitive ideas, if they were ideas. We can see no relationship of such utterances to that freedom of speech which is so acutely desirable if free institutions are to be preserved. Such face-to-face reviling is not remotely necessary in the debate of public questions. It is not argument. It has no persuasive power. Its only power is to inflame, to endanger that calm and useful consideration of public problems which is the protection of free government. Its tendency is to useless and dangerous disorder in which the object of free speech is lost to view.

That there are limitations to the right of even unabusive speech is well recognized. In time of war an argument against military service, at other times permissible, may be penalized because "the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent." *Schenck* v. *United States*, 249 U. S. 47, 52. The evil in that case was the obstruction to recruiting. Nor need the restriction be

limited to evil intended, provided the evil be imminent. As Mr. Justice Holmes said, "It is only the present danger of immediate evil or an intent to bring it about that warrants Congress in setting a limit to the expression of opinion where private rights are not concerned." *Abrams* v. *United States*, 250 U. S. 616, 628. In another dissenting opinion, by Mr. Justice Brandeis, in which Mr. Justice Holmes joined, it was again declared that the exercise of free speech may be restricted where speech would "produce, or is intended to produce, a clear and imminent danger of some substantive evil which the State may constitutionally seek to prevent." *Whitney* v. *California*, 274 U. S. 357, 373.

In the case last cited the majority declared (at page 371) that it was not open to question "that a State in the exercise of its police power may punish those who abuse this freedom by utterances inimical to the public welfare, tending to incite to crime, disturb the public peace, or endanger the foundations of organized government and threaten its overthrow by unlawful means." See also *Gitlow* v. *New York*, 268 U. S. 652, 666.

In maintaining the guaranty of free speech, the authority of the State to enact laws to promote health, safety, morals and the general welfare is "necessarily admitted." The limits of this reserved authority must be "determined with appropriate regard to the particular subject of its exercise." And "the power of the State stops short of interference with what are deemed to be certain indispensable requirements of the liberty assured. * * * Liberty of speech, and of the press, is also not an absolute right, and the State may punish its abuse." The statute must be tested by its operation and effect. And so an act is unconstitutional if it authorizes the suppression by injunction of the future publication of a newspaper found in the past to have printed scandalous matter, whether true or false. The fact that the peace may be disturbed by the continuance of the publication does not warrant complete suppression or censorship of a newspaper which criticizes public officials in terms likely to injure their reputation. *Near* v. *Minnesota*, 283 U. S. 697, 707, 708.

Upon similar grounds, a tax upon the advertisements in papers having a circulation of more than 20,000 a week is un-

constitutional as a previous restraint. *Grosjean* v. *American Press Company*, 297 U. S. 233. The statutes in these two newspaper cases did not punish abuses; they entirely suppressed, or tended to suppress, the right of press. Nobody can claim that the statute under which Chaplinsky was convicted does more than punish the abuse of free speech. It does not suppress the right of speech, even in particular places. It is not an indispensable requirement of right that one criticizing a person should be permitted to address him directly in a public place with offensive, derisive or annoying words likely to precipitate a breach of the peace. Charges of official wrong or neglect may be expressed by way of argument to the public in the streets with no more than minor danger of disturbance, and that is enough to meet the requirements.

"These rights may be abused by using speech or press or assembly in order to incite to violence and crime. The people through their legislatures may protect themselves against that abuse. The rights themselves must not be curtailed." Only so can desirable changes be made by peaceful means, which is the purpose of the right of free speech. *DeJonge v. Oregon*, 299 U. S. 353, 364, 365. "The limitation upon individual liberty must have appropriate relation to the safety of the state." *Herndon* v. *Lowry*, 301 U. S. 242, 258.

Consequently an act prohibiting the distribution of literature in the streets without regard to involvement in disorderly conduct is too sweeping to be valid. *Lovell* v. *Griffin*, 303 U. S. 444, 451. It strikes at the "very foundation of the freedom of the press by subjecting it to license and censorship." Our statute aims merely to punish the abuse of right (in this case disorderly conduct) and subjects the speaker to no restraint of indispensable right.

Legislation aimed at conduct which impedes free use of the streets may be sustained provided it does not abridge the liberty of one rightfully in the streets to impart information without interfering with such use. "Prohibition of such conduct would not abridge the constitutional liberty since such activity bears no necessary relationship to the freedom to speak, write, print or distribute information or opinion." *Schneider* v. *State*, 307 U. S. 147, 161. Our stat-

ute prohibits conduct which has no necessary relationship to those freedoms.

The right of speech, therefore, "is not absolute, but relative, and must be exercised in subordination to the general comfort and convenience, and in consonance with peace and good order; but it must not, in the guise of regulation, be abridged or denied." The statute making the limitation must meet the test named. And so, if the statute provides for no speech without a permit, and the issuance of the permit depends upon the mere opinion of the licensing official that his refusal will prevent disorder, there is a suppression of the right. *Hague* v. *C. I. O.*, 307 U. S. 496. But prohibition by legislative act of abusive speech under circumstances which the legislature may appropriately believe dangerous to public order, and the punishment of speech unnecessary to the full exercise of the right, is believed to be no restraint, or at most a permissible restraint.

The power and the duty of the State to preserve the peace seems not to be doubted. If, as in *Thornhill* v. *Alabama*, 310 U. S. 88, no clear and present danger of a breach of the peace is inherent in the activity of every person who approaches premises "on strike" for the purpose of publicizing the facts of the labor dispute, and a statute prohibiting picketing for the purpose of such publicizing is invalid because not addressed to abuses, the statute now under consideration is not of that sort. It aims at abuses. It evidences some care in balancing community order with the right of free discussion of matters of public concern.

Nor is our statute of the sort declared unconstitutional in *Cantwell* v. *Connecticut*, 310 U. S. 296. There the asserted offense was the soliciting of funds for religious purposes (by the sale of literature) without a permit. With the consent of two Roman Catholics in the street, the defendant played a phonograph record which turned out to be a criticism of the hearers' religion. The hearers were incensed. A breach of the peace might have occurred unless the defendant had withdrawn at request. "There was no evidence that he [the defendant] was personally offensive or entered into any argument with those he interviewed." The State court held that the charge was "not

assault or breach of the peace or threats on Cantwell's part, but invoking or inciting others to break the peace, and that the facts supported the conviction of that offense." It resulted that the case involved the right to express opinion without the informant doing a single act of violence, without committing a breach of the peace, without either threat or offensive remark.

Mr. Justice Roberts pointed out that freedom to believe and freedom to act are both secured by the due process clause of the Fourteenth Amendment. "The first is absolute, but in the nature of things, the second cannot be. Conduct remains subject to regulation for the protection of society." While the State may not wholly deny the right to disseminate views which may inviolably be held, it may by general and non-discriminatory legislation regulate the times and places and the manner of conduct of the disseminator upon the streets, "and may in other respects safeguard the peace, good order and comfort of the community, without unconstitutionally invading the liberties protected by the Fourteenth Amendment." The test suggested was whether the alleged protection of the State's interest has been pressed "to a point where it has come into fatal collision with the overriding interest protected by the Federal compact." So tested, the Connecticut statute, which left to the licensing officer the decision whether a cause was religious or not, was declared unconstitutional as involving previous restraint by way of censorship and not directed at the conduct of the disseminator of opinions.

In the course of discussion, Mr. Justice Roberts remarked upon permissible restraints of conduct. "The offense known as breach of the peace embraces • • • not only violent acts but acts and words likely to produce violence in others. • • • When • • • immediate threat to public safety, peace, or order, appears, the power of the State to prevent or punish is obvious." Such a breach of the peace by Cantwell, the State court had held, did not exist. "One may, however, be guilty of the offense if he commit acts or make statements likely to provoke violence and disturbance of good order, even though no such eventuality be intended. Decisions to this effect are many, but examina-

tion discloses that, in practically all, the provocative language which was held to amount to a breach of the peace consisted of profane, indecent, or abusive remarks directed to the person of the hearer. Resort to epithets or personal abuse is not, in any proper sense communication of information or opinion safeguarded by the Constitution, and its punishment as a criminal act would raise no question under that instrument [the Federal Constitution]."

In our opinion the statute under which Chaplinsky was convicted of a breach of the peace is not rendered invalid by the fact that it placed his conduct under such restraint as it did, and provided a penalty for it. *Milk Wagon Drivers Union* v. *Dairies*, United States Supreme Court, Oct. Term, 1940, No. 1.

The defendant further says that our statute is invalid because it is so vague and indefinite that one coming within its purview may not know what is prohibited. In this connection, the claim is made that the test of what is offensive is purely subjective in the sense that it is to be determined by the way the addressee reacts to it. The defendant therefore argues that nobody can know what is offensive language, since one man may be offended by words to which another man would take no exception. We have never construed the statute by any such test. The word "offensive" is not to be defined in terms of what a particular addressee thinks. The legislature had no such vague, shifting test in mind. As was long ago said, they had in mind the tendency of words, not their actual result. The analogy was that of the distinction between civil and criminal libel. *State* v. *Brown*, 68 N. H. 200.

The test is what men of common intelligence would understand would be words likely to cause an average addressee to fight. We have never applied the statute otherwise. The English language has a number of words and expressions which by general consent are "fighting words" when said without a disarming smile. In common understanding they are offensive in the Websterian sense of being such as to cause resentment, or, as Funk and Wagnalls say perhaps more aptly, adapted to give offense, offense being that which causes anger. Such words, as ordinary men know, are likely to cause a fight. So are threatening, profane or obscene

revilings. Derisive and annoying words can be taken as coming within the purview of the statute as heretofore interpreted only when they have this characteristic of plainly tending to excite the addressee to a breach of the peace. If the time may ever come when the words "damned Fascist" will cease to be generally regarded as "fighting words" when applied face-to-face to an average American, this is not the time. The presiding justice might have been warranted in telling the jury that they were offensive as a matter of law. But since he thought the jury as competent as he to understand the words, he left the question to them.

The statute, as construed, does no more than prohibit the face-to-face words plainly likely to cause a breach of the peace by the addressee, words whose speaking constitute a breach of the peace by the speaker—including "classical fighting words", words in current use less "classical" but equally likely to cause violence, and other disorderly words, including profanity, obscenity and threats. Men of common intelligence, situated as was Chaplinsky, do not need to guess at its meaning or differ as to its application. See *Connally* v. *Company*, 269 U. S. 385, 391. If the defendant or others might have guessed that less than such words were prohibited, or if they might have differed about what other words, if any, came under the ban, it was open to all to know, as we have heretofore held, that it could not apply except to words likely to cause a breach of the peace when addressed to an individual in a public place. Within the ambit of the statute, one does not need to guess at what is prohibited, for all men of common intelligence know almost instinctively what are the dangerous words when so addressed.

The holding of this statute as sufficiently definite is believed to be consistent with the decisions in *Stromberg* v. *California*, 283 U. S. 359, 369 (where the construction given included in the prohibition a fair use of constitutional freedom), in *Herndon* v. *Lowry*, 301 U. S. 242 (where defendants were obliged to exercise the gift of prophecy in order to know the application of the statute), in *Lanzetta* v. *New Jersey*, 306 U. S. 451 (where the defendant did not have the benefit of a permissible construction prior to the act with which he was charged), and in *Thornhill* v. *Alabama*, 310

U. S. 88 (where the prohibition extended to the use of words "without annoyance or threat of any kind").

The words "offensive", "derisive" and "annoying", in this connotation of tendency to disorder in public places, are commonly used and commonly understood. They are not wanting in meaning. Some are used in statements of legal principles by those who are careful of accuracy and definiteness of statement. Thus, "personally offensive" language, "profane, indecent or abusive remarks directed to the person of the hearer", and "epithets or personal abuse", all of which are caught up in the phrase "words likely to produce violence in others." *Cantwell* v. *Connecticut, supra.* Though general in a sense, such words have commonly accepted popular and legal significance. When one speaks of publicizing "without annoyance or threat of any kind" (*Thornhill* v. *Alabama, supra*) he is not to be misunderstood, even though "without just or legal excuse" are words without ascertainable meaning. And so reference to an injunction prohibiting officials from interfering with the right of speakers "in an orderly and peaceable manner" is definite, because everybody understands what "orderly and peaceable" means. *Hague* v. *C. I. O.*, 307 U. S. 496, 517. Likewise, any intelligent person may understand the prohibition of our statute as it has always been construed. Equally clear is the phrase "matter obscene or offensive to public morals", or the phrase "disorderly conduct" (*Lovell* v. *Griffin*, 303 U. S. 444).

Finally, no person situated as was Chaplinsky, is left in any forbidden sense to guess what a jury will guess. Neither he nor the jury is faced with uncertainty in any other sense than would be the case if the charge were negligent conduct, where the test is that of average conduct or gross negligence. Our statute deals "with the actual, not with an imaginary condition other than the facts." *International Harvester Company*, 234 U. S. 217, 223. And it deals with those facts upon the basis of tendencies of words used face-to-face in public places which are matters of common knowledge and appreciation.

Exceptions overruled.

All concurred.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1941

No. 255

■

WALTER CHAPLINSKY, *Appellant,*

v.

STATE OF NEW HAMPSHIRE

■

APPEAL FROM THE SUPREME COURT OF
THE STATE OF NEW HAMPSHIRE

APPELLANT'S BRIEF

JOSEPH F. RUTHERFORD
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UNITED STATES SUPREME COURT

OCTOBER TERM 1941

No. 255

WALTER CHAPLINSKY, *Appellant,*

v.

STATE OF NEW HAMPSHIRE, *Appellee*

APPEAL FROM NEW HAMPSHIRE SUPREME COURT

APPELLANT'S BRIEF

Opinions Below

The opinion of the Supreme Court of New Hampshire is not yet officially reported, but is unofficially reported in the Atlantic Reports, Volume 18, Second Series, Page 754. Record, p. 52.

Jurisdiction

Jurisdiction of the Supreme Court of the United States is invoked under Section 237 (a) of the Judicial Code [28 U. S. C. 344 (a)], and under the Act of Congress of January 31, 1928, Chapter 14, 45 Stat. 54, and under the Act of Congress of April 26, 1928, Chapter 440, 45 Stat. 466.

Timeliness

The judgment of the Supreme Court of New Hampshire was entered on March 4, 1941. (Record page 64) The opinion of that court was delivered on the same date and appears in the Record, p. 52 *et seq.* The judgment of the Supreme Court of New Hampshire became final on March 4, 1941, the date of the opinion. The petition for appeal is filed and presented within ninety (90) days from such date to this Court and is therefore timely.

The Statute

The statute, constitutionality and validity of which is here drawn in question, is Section 2 of Chapter 378, page 1470 of the Public Laws of the State of New Hampshire, reading as follows:

> "No person shall address any offensive, derisive or annoying word to any other person who is lawfully in the street or other public place, nor call him by any offensive or derisive name, nor make any noise or exclamation in his presence and hearing with intent to deride, annoy, or offend him or prevent him from pursuing his lawful business or occupation." (R. p. 52, 65; Jurisdictional Statement pp. 23-35)

The Supreme Court of New Hampshire and the trial court held that the statute was not unconstitutional and that it did not abridge freedom of speech, contrary to the due process clause of the Fourteenth Amendment to the United States Constitution. That court sustained the statute's applicability and validity to appellant's conduct.

Statement

The appellant, Walter Chaplinsky, on the afternoon of Saturday, April 6, 1940, was standing and walking back and forth on the sidewalk at the corner of North Main Street at

Central Square in the City of Rochester, New Hampshire. He was distributing and offering to distribute Biblical periodicals entitled "Watchtower", "Consolation" and others, and announcing his pamphlets as his means of preaching the gospel. Appellant is an ordained minister of Jehovah God and is one of Jehovah's witnesses possessing credentials attesting to such fact.

While appellant was thus engaged in his work, a mob formed around him on the sidewalk, a tumultuous crowd of about fifty or sixty persons objected to his work and threatened him with violence if he did not discontinue. While the crowd was still around him, City Marshal Bowering, accompanied by a man named Bowman, came through the crowd and accosted appellant, and Bowman assaulted the appellant, catching him by the throat with his left hand and struck at him with his right fist, whereupon appellant wrenched himself free and turned to Marshal Bowering and said, "Marshal, I want you to arrest this man," and Bowering answered, "I will if I feel like it."

The Marshal walked away with Bowman and the appellant continued his work of offering the magazines containing the message of God's Kingdom for distribution on the sidewalk. In about four or five minutes appellant looked down South Main Street and saw Bowman coming rapidly down the street with a staff and flag in his hand, with the staff pointed towards appellant. As Bowman came within about ten feet of appellant, he made a terrific lunge at appellant with the flagstaff as a spear in an effort to plunge the flagstaff through appellant, who avoided the blow, but was pushed by Bowman into the gutter against an automobile as he passed appellant. Bowman then walked to the corner and gave the flag to another man and came back toward appellant and caught him by the collar and said, "You son of a bitch—." Bowman then asked the appellant, "Will you salute the flag?"

The Marshal, Officer Lapierre and two others picked him

up from the ground and started him along Wakefield Street toward the City Hall, shoving him along roughly. While so doing, the appellant turned to the Marshal and asked, "Will you please arrest the ones who started this fight?" and the Marshal replied, "Shut up, you damn bastard, and come along," whereupon appellant said to him, "You are a damn Fascist and a racketeer." R. 44.

Marshal Bowering testified that appellant called him "a God-damn racketeer, a damn Fascist". R. 12.

While being shoved and dragged by the officers to City Hall along Wakefield Street in a rough manner, appellant recognized among the officers escorting him one of the men who had struck him and appellant asked him, "Who are you?" and the man replied, "I am a Deputy Sheriff." Appellant said, "If you are a Deputy Sheriff this whole city officials of Rochester are Fascists." As they entered the City Hall, the man who identified himself as a Deputy Sheriff named Ralph Dunlap said to the appellant, "You son of a bitch, we ought to have left you to that crowd there and have them kill you"; and Marshal Bowering shoved appellant down into a chair and said to appellant, "You unpatriotic dog, I am going to arrest you on account you called me a God-damned Fascist," to which appellant replied, "You are a liar, I did not call you a God-damned Fascist." Appellant testified he called him "a damn Fascist". R. 44.

However, even as to that, Marshal Bowering was not certain, because on cross-examination, he testified as follows:

> Q. Are you sure that the defendant said "You are a God damn Fascist and a racketeer"?
>
> A. No he said "You're a God damn racketeer and a Fascist" or damn Fascist, one or the other. Racketeer was first.
>
> Q. Are you absolutely certain that he used the word "God"?
>
> A. Absolutely. R. 20.

Q. And you're sure about the position of these words, "God damn Fascist"?

A. No, he said racketeer first and then Fascist, and afterwards he said the city officials were Fascists or agents of Fascists. R. 21.

All the State's witnesses uniformly testified that appellant called the marshal a God-damn racketeer and a damn Fascist. R. 6, 10, 12, 20, 22, 29.

Appellant was charged by warrant and complaint with a violation of the aforesaid statute in the municipal court of the City of Rochester, which complaint reads, among other things, as follows:

> "County of Strafford, aforesaid, with force and arms, in a certain public place in said city of Rochester, to wit, on the public sidewalk on the easterly side of Wakefield Street, near unto the entrance of the City Hall, did unlawfully repeat, the words following, addressed to the complainant, that is to say, 'you are a God damned racketeer' and 'a damned Fascist and the whole government of Rochester are Fascists or agents of Fascists' the same being offensive, derisive and annoying words and names." R. 1.

He was convicted and duly appealed to the Superior Court. Thereafter his case was tried *de novo* in the Superior Court at Dover, New Hampshire, before a jury, which resulted in a verdict of guilty. Thereafter, the appellant was sentenced to six months in the State prison. R. 51.

At the close of the State's case and at the close of the entire case, in the trial in the Superior Court, the appellant filed motions to dismiss the complaint and for a directed verdict. (R. 32, 48, 51) These motions were overruled by the Court, to which rules the appellant duly excepted. R. 2-4, 51.

On November 13, 1940, bill of exceptions covering all of the points of law urged were duly presented to the trial

judge and allowed. The case was thereupon transferred to the Supreme Court of New Hampshire for determination. R. 1-4, 51.

The case was therefore timely appealed to the Supreme Court of New Hampshire. R. 51, 52.

Federal Questions Presented

Substantial federal questions attacking the validity of the statute were raised in the Superior Court and also in the Supreme Court of New Hampshire. They were first raised by motion to quash, filed at the beginning of the trial, and for directed verdict, filed at the close of all the evidence.

The grounds for these motions were that the undisputed evidence showed that appellant was not guilty of the offense charged and that the statute in question is contrary to the due process clause of the Fourteenth Amendment to the United States Constitution because it denies freedom of speech.

Appellant also urged that the statute was unconstitutional because it is vague and indefinite and sets no reasonable standard of guilt, permitting a dragnet to be made thereof, contrary to the due process clause of the Fourteenth Amendment to the United States Constitution. R. 2, 3, 48, 51, 52.

These motions and grounds were overruled by the trial court and the validity of the statute was upheld. R. 32, 48, 51.

The Supreme Court of New Hampshire passed upon each of said federal questions attacking the validity of the statute on its face and as construed and applied and also held the statute valid and constitutional and overruled appellant's contentions. R. 52-64.

The Supreme Court of New Hampshire therefore sustained the conviction of the appellant and affirmed the judgment of the trial court, committing the appellant to the State prison for six months. R. 51, 52-64.

Specification of Errors to Be Urged

Appellant assigns the following errors in the record and proceedings in said cause:

1. The Supreme Court of New Hampshire committed reversible error in failing to hold that the statute in question on its face and as construed and applied to appellant is invalid by reason of the fact that:

   a) It unreasonably and unlawfully abridges and denies appellant's right of freedom of speech, contrary to the due process clause of the Fourteenth Amendment to the United States Constitution.

   b) It is vague, indefinite, too general, sets no reasonable standard of guilt and permits a dragnet, all contrary to the due process clause of the Fourteenth Amendment to the United States Constitution.

2. The Supreme Court of New Hampshire committed reversible error in failing to hold that appellant was entitled to introduce evidence of *provocation* for the use of the words spoken by him to Marshal Bowering and in failing to hold that the truth was justification and complete defense.

Points for Argument

POINT ONE

Section 2 of Chapter 378 (page 1470) of the Public Laws of the State of New Hampshire, on its face and as construed and applied, violates the due process clause of the Fourteenth Amendment to the United States Constitution, because appellant is denied his right of freedom of speech, contrary thereto.

POINT TWO

Section 2 of Chapter 378 (page 1470) of the Public Laws of the State of New Hampshire, on its face and as construed and applied, violates the due process clause of the Fourteenth Amendment to the United States Constitution, because it is vague, indefinite, too general, sets no reasonable standard of guilt and permits a dragnet, contrary thereto.

POINT THREE

Evidence as to provocation is admissible as a defense to the offense charged, and if the words spoken are truthful it is complete justification and defense to the offense charged.

ARGUMENT

POINT ONE

Section 2 of Chapter 378 (page 1470) of the Public Laws of the State of New Hampshire, on its face and as construed and applied, violates the due process clause of the Fourteenth Amendment to the United States Constitution, because appellant is denied his right of freedom of speech, contrary thereto.

It is now fundamentally established that freedom of speech is a right protected against state invasion under the due process clause of the Fourteenth Amendment.

De Jonge v. Oregon,
299 U. S. 353, 364

The undisputed evidence shows that appellant, immediately prior to his unlawful and unjustified arrest, and also during the time that he was unlawfully assaulted, was engaged in exercising his right of freedom to worship Almighty God and freedom of press, in distributing the "Watchtower" and "Consolation" magazines. He had done no wrong and had not acted in an offensive way whatsoever. The mob had gathered about him, with the knowledge and consent of the police, had threatened to get and did get an American flag, defilingly placed it before him and arbitrarily commanded him to salute it, and upon his refusal, he was assaulted and beaten.

He had every reason to expect police protection, but was given none. On the contrary, the police, without any reason whatsoever, jumped upon him and arrested him without excuse, woefully mistreating him, and when called upon by him to arrest the real law violators, dismissed the matter by

stating that such arrest would be made if it suited their fancy.

The appellant had the right to criticize the complaining witness as a public official openly acting in a wrongful manner, and also to criticize the local municipal government by the use of any language that he desired to employ as long as he did not induce or ask others to use violence against the local municipal government to overthrow the same. It is admitted by all that he did not attempt to overthrow the government, but was for good cause openly criticizing the local government and its agents, which he had a right to do.

Wrongful oppression openly practiced, as here, by citizens in the presence of and with the consent of public officials is rightly subject to open and prompt condemnation by the one against whom such wrongful acts are performed. Earnestly and in good faith this contention and the following argument appellant submits for unbiased consideration.

Appellant's use of the word "damned" is, in these circumstances, not a violation of the statute. Here the use of that word served only to emphasize, to arouse to a realization of the wrongfulness of the course then being pursued by those thus spoken to.

The question of whether or not the complaining witness was a *racketeer* is a matter of opinion which, under the evidence, was fitly and timely expressed. The evidence shows that the complaining witness, a public officer, openly permitted a mob to attack the appellant and when the appellant *rightly* attempted to defend himself, the complaining witness arrested him, beat and abused him. Let the Court ponder!

The only reason the mob gathered against the appellant and the only reason the appellant was arrested, was on account of the fact that he was one of Jehovah's witnesses distributing literature disliked by the complaining witness and mobsters. Let this be clearly and fittingly emphasized in the consideration of the appellant's position in the cir-

cumstances. Let it be borne in mind that at the time of the wrongful assault upon him he was upon a public street, where he had a right to be, and where he was lawfully doing in a peaceful manner that which he had a right to do, namely, imparting his views to others *in their interest*, as he sincerely believed. There is no showing that his *personal* deportment was noisy, truculent, overbearing or offensive. Appellant's right to distribute literature is guaranteed by the Constitution.

On the other hand, there is evidence that the complaining witness conspired with the mobsters in violation of Sections 51 and 52, Title 18, United States Code, to deprive the appellant of this right. One thus acting, in the opinion of the appellant, could be properly termed a "racketeer". Jehovah God has condemned racketeers and hence the expression "God damned", even *if*, as and when used in such circumstances, imports verity or constitutes a simple definition of fact. The right to use such definitive and descriptive language in a proper manner and time is guaranteed by the Constitution regardless of whether the one so described agreed or not.

This same argument applies to the words "damned Fascist", and the words "the whole government of Rochester are Fascists or agents of Fascists". Use of the word "Fascist" is not derisive, and does not accuse the complaining witness of being an Italian or a follower of Benito Mussolini. The word "Fascist" is now an English word which in common parlance means one who employs methods and acts in a manner so as to deprive another of his constitutionally secured rights, by misapplying laws or otherwise conspiring to deprive another of such rights, contrary to the Constitution and its fundamental principles of freedom.

The acts of the complaining witness and his mobster allies constituted "Fascist" action.

"Racketeer" is defined by Webster's *New International Dictionary*, Second Edition, Unabridged, 1935, as "one who

singly or in combination with others extorts money or *advantages* by threats of violence or of *unlawful interference* with business".

Marshal Bowering was manifestly working "hand in glove" with the mobsters and the ones assaulting the appellant. He winked at such miserable law violations and failed to enforce the law which had been openly violated by the mobsters in his presence and in plain sight. His failure thus to do constituted and was a conspiracy or combination with others to extort from him, or deprive appellant of, his rights, privileges and advantages enjoyed under the Constitution, by threats of violence and permitting others in such combination to carry out such threats of violence. He was guilty of unlawful interference with appellant's business. His failure to protect the appellant from injury and his unlawfully arresting the appellant and unlawful handling and abuse of the appellant constituted and were acts of a "racketeer" and a "Fascist", and such conduct rightly provoked the appellant to *express* righteous wrath.

The Marshal deceitfully acted with the wicked mobsters. "The wicked worketh a deceitful work."—Proverbs 11:18.

The Marshal had a scheme which he planned to use for selfish gain and to work to the injury of others, and that was to permit the appellant to be mobbed and if the appellant failed to run from the mobsters, then he would arrest him, as he did.

A "racketeer" therefore is a schemer, who is artful, wily and cunning and who uses his plan or scheme to gain advantage unfairly over others. The "racketeer" gains undue advantage over others and then uses his scheme or plan to rob or pillage others of their lawful and constitutionally secured rights. All "racketeers" are public enemies, and enemies of honest persons and enemies of God, and God has condemned "racketeers", and Fascists also.

Men who engage in traffic that is unlawful and works injury to the people are "racketeers" and public enemies. All

such public enemies either put the people in fear or fraudulently overreach them. Men who engage in political schemes to misrepresent the facts in order to induce the people to support them that they may reap a personal or pecuniary gain are "racketeers" and public enemies, or any who curry favor with lawless elements for reasons of "popularity" put themselves in the "racketeer" class.

Marshal Bowering, by his conduct, therefore laid himself open to the charge made by the appellant and was guilty as charged.

In arresting and prosecuting the appellant, Bowering 'framed mischief by law' as prophesied of such persons in Psalm 94:20.

It is to be noted that the statute prohibits the use of "offensive and annoying words" to another on the street or in a public place with *intent* to annoy or offend him, and such statute is not confined to slanderous and libelous statements but extends to prohibit one from speaking *the truth* in the presence of another. Webster defines the words of this statute as follows:

> *Derisive*—Expressing, serving for, or characterized by derision. Derision—to scornfully deride, act of deriding, contempt.
>
> *Annoying*—That annoys; molesting, vexatious.
>
> *Offensive*—Making attack; pertinent to, or characterized by, offense or attack, assailant; aggressive: hence, fitted for, or used in, attacking.
>
> Giving pain or unpleasant sensations; obnoxious; revolting; as an offensive smell; offensive sound.
>
> Giving offense, causing, or such as to cause, displeasure, or resentment; insulting; as offensive words.
>
> Obs. *a*) causing injury or damage; harmful, injurious; *b*) of the nature of an offense, sin or transgression; offending or tending to offend; transgressive; *c*) productive of spiritual stumbling.

Attention of the Court is drawn here to the fact that it is a fundamental proposition that if a statute, constitutional on its face, is applied to deprive and interfere with constitutionally secured rights, such as the undisputed evidence shows the appellant was exercising at the time of his arrest, then such statute becomes invalid.

What do the words mean when surrounded by the terminology of the statute?

When is one guilty under this statute by the use of such words?

The words are so broad that they include almost any word. The *manner* of saying "Hello" may fall into that category. The *manner* of criticism of any act of a government official, criticism of an actor's performance in the theater, criticism of almost anything, might be offensive, annoying, or derisive; at least to the person to whom the remark, name, noise, or exclamation is addressed. If the criticism is written and handed to another in the street the writer would be subject to prosecution under this statute. If one man on the street tells another that he doesn't like him, or tells a "New Dealer" that the "New Deal" is ruining the nation, swallowing up the Democratic party and destroying the Republican party and that he doesn't think Roosevelt should have been re-elected for a third term; or tells a policeman that the police officials of the city are inefficient, he may be and could be prosecuted and convicted under this statute, and everyone admits that such interference is prohibited by the Constitution. Everything depends on how one says a thing and how the person to whom it is said takes it or interprets it, under this statute. Thus it becomes a dragnet enforceable at the whim of individuals.

The descriptive words of the statute are so broad that they would permit an enforcement of the statute to curb, suppress and censor honest criticism of government, religion, politics, social functions, or any other subject.

The statute covers equally lawful and unlawful words and conduct and makes no distinction.

It does not confine itself to immoral, indecent, obscene, or profane words. ITS DEFECTS IN THESE RESPECTS MAKES IT UNCONSTITUTIONAL.

It PREVENTS *free communication of thoughts, ideas, information, and opinion merely because such might offend, annoy, or deride another.*

It is to be noted that the New Hampshire Supreme Court admits that the statute prohibits even truthful utterances, which shows that it has been *rightly* construed as *prohibiting* (and that *wrongfully*) freedom of speech.

The New Hampshire Supreme Court further held, however, that the evidence of provocation and justification was inadmissible. We have made complaint against the action of the courts below in holding that provocation and justification for the use of the words in question were inadmissible.

A statute which makes one guilty of an offense even though the challenged utterance be clearly justifiable is in derogation of the right of speech. The New Hampshire Supreme Court says that speech is limited to words that would directly tend to cause violence. That court said:

> " . . . to the extent that no words were forbidden except such as have a direct tendency to cause acts of violence by the person to whom, individually, the remark is addressed."

The fact that speech is likely to cause violence is no ground for suppressing. This American rule is well expressed in the case of *Dearborn Publishing Co.* v. *Fitzgerald*, 271 F. 479, where it was said:

> "If it be assumed that the article might tend to excite others to breaches of the peace the reply is plain. It is the duty of all officials charged with preserving order and peace to suppress firmly and promptly all persons guilty of disturbing it, and not forbid innocent persons

> to exercise their lawful and equal rights. . . . If defendants' actions were sustained, the constitutional liberty of every citizen freely to speak, write and publish his sentiments on all subjects, being responsible only for abuse of that right, would be placed at the mercy of every public official who for the moment was clothed with authority to preserve the public peace and the right to a free press thus destroyed. . . . "

In *Whitney* v. *California,* 274 U. S. 357, this court, speaking through Mr. Justice Brandeis, said:

> "The fact that speech is likely to result in causing some violence . . . is not enough to justify its suppression."

We submit therefore that this statute is void on its face because it denies and deprives the appellant and all other persons of right of freedom of speech, contrary to the Fourteenth Amendment.

This case is governed by the decisions of this Court in *De Jonge* v. *Oregon,* 299 U. S. 353, 362; *Stromberg* v. *California,* 283 U. S. 359, 367-368; *Carlson* v. *California,* 310 U. S. 106; *Thornhill* v. *Alabama,* 310 U. S. 88, in which latter case, this Court, speaking through Mr. Justice Murphy, said:

> "The safeguarding of these rights to the ends that men may speak as they think on matters vital to them and that falsehoods may be exposed through the processes of education and discussion is essential to free government. Those who won our independence had confidence in the power of free and fearless reasoning and communication of ideas to discover and spread political and economic truth. Noxious doctrines in those fields may be refuted and their evil av rted by the courageous exercise of the right of free discussion. Abridgment of freedom of speech and of the press, however, impairs those opportunities for public edu-

cation that are essential to effective exercise of the power of correcting error through the processes of popular government. Compare *United States* v. *Carolene Products,* 304 U. S. 144, 152-153n. Mere legislative preference for one rather than another means for combatting substantive evils, therefore, may well prove an inadequate foundation on which to rest regulations which are aimed at or in their operation diminish the effective exercise of rights so necessary to the maintenance of democratic institutions. It is imperative that, when the effective exercise of these rights is claimed to be abridged, the courts should 'weigh the circumstances' and 'appraise the substantiality of the reasons advanced' in support of the challenged regulations. *Schneider* v. *State,* 308 U. S. 147, 161, 162."

"The streets are natural and proper places for the dissemination of information and opinion," orally or otherwise. See *Schneider* v. *State,* supra; *Hague* v. *C. I. O.,* 307 U. S. 496; *Carlson* v. *California,* supra; *Hannan* v. *Haverhill,* 120 F. 2d 87.

Public Law, chapter 378, section 2, is not aimed at any inherent danger, in any and every word, exclamation, name or remark which may be addressed to another in a street or public place with intent to deride, offend, or annoy, or prevent him from pursuing his lawful business or occupation. Under the statute it is possible that a man may without intent to deride, offend, or annoy address profane language to another in the street. The individual to whom controversial political, social or economic speech is addressed may or may not take it in a proper light. Others in the vicinity may be offended to the extent that a breach of the peace may ensue. The statute is not specifically directed at any inherent, clear, or present danger of destruction to life or property; and when the interest that the statute seeks to protect is balanced against the interests of the individual and community in the rights of free speech, free press, and

free worship, it cannot be found to be warrantable. Under some circumstances profanity and personal abuse can be freely and rightly used without violating the statute.

The Supreme Court of New Hampshire takes the view that one cannot speak the truth or express an opinion publicly, if by doing so, violence might result from others hearing the speech. That opinion is based upon the importance and convenience of preserving desirable conditions. Although the intention might be good, the results are obviously bad and lead to the destruction of the liberties of the people. Conveniences do not justify the interference here practiced.

Convenience or expediency might justify interference with conduct in many instances, but cannot warrant interference with freedom of speech. Preservation of desirable conditions and conveniences yield to the preservation of freedom of speech. *Schneider* v. *State*, supra.

The construction placed upon the statute by the New Hampshire Supreme Court permits conviction for the exercise of the right of free speech even where there is no clear and present danger of violence or threatened violence or breach of the peace. Breach of the peace is not necessary in order to sustain a conviction. This Court has held that there must be a clear and present danger of destruction of life or property or breach of the peace. *Thornhill* v. *Alabama*, supra. This matter was well stated by Mr. Justice Holmes in the case of *Schenck* v. *United States*, 249 U. S. 47, 52, as follows:

> "The question in every case is whether words used are used in such circumstances and are of such a nature as to create a *clear and present danger* that they will bring about the substantive evils that Congress has a right to prevent."

The false reasoning of the Supreme Court of New Hampshire, if permitted to stand, would ultimately destroy free-

dom of speech in the United States. It would bar all political discussions, discussions on religion, commerce, finance or any subject that might be controversial. The statute is not limited to personal abuse or epithets addressed to another, but extends into the entire field of discussion. It prohibits one from uttering in a public place opinions or THE TRUTH.

The statute is therefore void on its face and invalid as it is applied because it denies and abridges appellant's right of freedom of speech contrary to the Fourteenth Amendment. For this reason the judgment of conviction should be set aside and the appellant discharged.

POINT TWO

Section 2 of Chapter 378 (page 1470) of the Public Laws of the State of New Hampshire, on its face and as construed and applied, violates the due process clause of the Fourteenth Amendment to the United States Constitution, because it is vague, indefinite, too general, sets no reasonable standard of guilt and permits a dragnet, contrary thereto.

The statute is also violative of the due process clause of the Fourteenth Amendment because it is vague and indefinite and permits a dragnet.

The words "offensive, derisive, annoying", "deride, annoy, offend" and "prevent him from pursuing his lawful business or occupation" take on a very vague, indefinite and uncertain meaning as used in Public Law, chapter 378, section 2.

No man of ordinary intelligence can safely discern from this statute just what he can say, or what words he may use in addressing another in the street or other public place. *Almost anything* that is said can be taken to be derisive under this statute, depending upon the susceptibilities of the hearer. Strikers or pickets may use some word, express some

opinion which they had a right to say and which, even though said innocently and with good intention, can be interpreted by some as having been said with intent to prevent a man from pursuing his lawful business or occupation. For example, a picket may say to a salesman entering the store or establishment being picketed, "Don't sell A. He is unfair to labor." For such remark the spokesman may be and can be prosecuted and convicted under this statute.

This statute is attacked as being void on its face, for the reason that it is vague and indefinite and also because, on its face, it deprives every one of the right of freedom of speech, contrary to the Fourteenth Amendment.

As has been shown, the terminology as construed by the Supreme Court of New Hampshire is so vague and indefinite that it is difficult to say just what is meant. It gives ample leeway for those who may be in control so to enforce a statute like this with such arbitrary and harsh discrimination that all free discussion can be curtailed by fear of prosecution. The threat inherent in such arbitrary measures is equally as evil as the threat of license or censorship.

The test is whether a statute defining an offense is void for uncertainty—whether the language may apply not only to a particular act about which there can be little or no difference or opinion, but equally to other acts about which there may be radical differences, thereby devolving upon the court the exercise of arbitrary power of discriminating between the several classes of acts. *Czarra* v. *District of Columbia Med. Supervisors,* 25 App. (D. C.) 443.

The dividing line between what is lawful and what is unlawful cannot be left to conjecture. *United States* v. *Capital Traction Co.*, 34 App. (D. C.) 592.

In support of the contention that the statute is contrary to the Fourteenth Amendment because denying freedom of speech and personal liberty without due process of law, we refer to:

Detroit Creamery, et al. v. *Kinnan, et al.*,
264 F. 845
Smith v. *Cahoun*,
283 U. S. 564
Connally v. *General Constr. Co.*,
269 U. S. 391, 392
Dials v. *Commonwealth*,
192 Ky. 440; 233 S. W. 888

and *Small Co.* v. *American Sugar Ref. Co.*, 267 U. S. 233, where enforcement of a Federal statute was voided because of the fact that the statute was too vague, indefinite and indeterminate. It was a statute prohibiting excess profits on necessaries. The Court cited the case of *United States* v. *Cohen Grocery Co.*, 255 U. S. 81, and *Weeds, Inc.* v. *United States*, 255 U. S. 109; and from the *Cohen Grocery* case quoted as follows:

> "Observe that the section forbids no specific or definite act. It confines the subject matter of the investigation which it authorizes (by court and jury after the act) to no element essentially inhering in the transaction as to which it provides. It leaves open, therefore, the widest conceivable inquiry, the scope of which no one can foresee and the result of which no one can foreshadow or adequately guard against."

See also *United States* v. *Brewer*, 139 U. S. 278; *Louisville & Nashville Ry. Co.* v. *Railroad Comm. of Tenn.*, 19 F. 679; *Louisville & Nashville Ry. Co.* v. *Commonwealth*, 99 Ky. 132, 35 S. W. 129.

This general principle was applied in *Ex parte Jackson*, 45 Ark. 158, 164, where the statute annulled made it a misdemeanor to "commit any act injurious to the public health or public morals, or to the perversion of public justice or the due administration of the laws".

The principle is clearly applicable here and the statute in question should be held void upon its face.

In *United States* v. *Ballard*, 12 F. Supp. 321, United States district Judge Hamilton, of the Western District of Kentucky, held unconstitutional the internal revenue law known as Section 275, Title 26 U. S. C. A., and made a very eloquent argument in our favor appearing at pages 324 through 326 of the opinion, a part of which is quoted as follows:

> "The crime must be created by the Act of Congress, alone, for the public are not required to look beyond the act in their endeavor to ascertain what is criminal, and the discretion of fixing what facts import criminality is exclusively that of the law makers as distinguished from the executive."

See also the case of *International Harvester Co.* v. *Commonwealth of Kentucky*, 234 U. S. 217, 221, in which Mr. Justice Holmes outlawed the anti-trust law of Kentucky, which made price-fixing *lawful*, unless for the purpose or with effect of fixing a price that was greater or less than the real value of the article.

In *Herndon* v. *Lowry*, 301 U. S. 242, the majority opinion by Mr. Justice Roberts states at p. 264, in reference to Georgia Penal Code, sec. 56 (Any attempt, by persuasion or otherwise, to induce others to join in any combined resistance to the lawful authority of the State shall constitute an attempt to incite insurrection):

> "The statute sets no *reasonable standard of guilt*. So vague and indeterminate are the boundaries thus set to the freedom of speech and assembly that the law necessarily violates the guarantees of liberty embodied in the Fourteenth Amendment." [Italics added]

In *De Jonge* v. *Oregon*, supra, the statute in question (Any person who shall preside at or conduct or assist in conducting any assemblage of persons, of any organization, or any society, or any group which teaches or advocates the doctrine of criminal syndicalism or sabotage is guilty of a

felony: Here the defendant spoke at a Communist meeting) was held to be so broad that it abridged the freedom of speech and of the press, and the right of peaceable assembly, and thus violated the due process clause of the Fourteenth Amendment.

In *Near* v. *Minnesota,* 283 U. S. 697, the Minnesota statute, Chap. 285, Sessions Laws of Minnesota 1925, provided:

> "Sec. 1. Any person who as an individual, or as a member or employee of a firm, or association or organization, or as an officer, director, member or employee of a corporation, shall be engaged in the business of regularly or customarily producing, publishing or circulating, having in possession, selling or giving away (a) an obscene, lewd and lascivious newspaper, magazine, or other periodical, or (b) a *malicious, scandalous* and defamatory newspaper, magazine or other periodical, is guilty of a nuisance, and all persons guilty of such nuisance may be enjoined as provided in the act."

There the complaint charged the defendant with printing a malicious, scandalous and defamatory newspaper. There was no question that the columns referred to in the complaint were malicious, scandalous and defamatory. The defendant alleged that the statute was unconstitutional as it abridged the right of freedom of the press as guaranteed in the Fourteenth Amendment, and that therefore the complaint since it issued under an invalid statute was void. *The court held the statute to be invalid and void on its face,* as it abrjdged the right of freedom of the press.

In *Stromberg* v. *California,* 283 U. S. 359, the California Penal Code, sec. 403a, prohibited the display of the red flag "as a sign, symbol or emblem of opposition to organized government". The complaint charged that the defendant "did wilfully, unlawfully and feloniously display a red flag and banner in a public place and in a meeting place as a sign, symbol and emblem of opposition to organized government

and as an invitation and stimulus to anarchistic actions and as an aid to propaganda that is and was of a seditious character." There the defendant was found guilty. The court held the statute invalid under the Fourteenth Amendment of the Constitution of the United States because it was so vague and indefinite and ambiguous as to permit punishment for fair use of opportunity to advocate change of government, and that as such it was repugnant to the guarantee of liberty.

In *Lanzetta* v. *New Jersey,* 306 U. S. 451, the statute in question was Section 4, Chapter 155, New Jersey Laws of 1934. (Any person not engaged in any lawful occupation, known to be a member of any gang consisting of two or more persons, who has been convicted at least three times of being a disorderly person, or who has been convicted of any crime in this or in any other State is declared to be a gangster provided, however, that nothing in this section contained shall in any wise be construed to include any participant or sympathizer in any labor dispute.) This Court held that the words "gang", "gangster," "known to be a member," and "any person not engaged in any lawful occupation" were so indefinite and ambiguous as to their meaning and as to the interpretation to be given that the statute constituted a violation of the due process clause of the Fourteenth Amendment and consequently was invalid on its face.

In *Atlantic Ref. Co.* v. *Trumbull* (1930 Conn.), 43 F. 2d 154, a statute prohibiting sale of lubricating oil not "equal to or better in quality" than certain government specifications was held invalid for indefiniteness.

Public Law, chapter 378, section 2, when compared with the cases cited certainly falls into the same classification. This statute in effect allows prosecution for the expression of opinion and criticism, on any matter of public concern as well as private. It affords opportunity for a complete and thorough dictatorial censorship which can be imposed at the will of the power in control. It constitutes a grave danger to democracy.

The "intent" limitation in Public Law, chapter 378, section 2, does not cure its defectiveness. In *Herndon* v. *Lowry*, supra, the intent which had to be shown could only be judged by the "dangerous tendency" of the words uttered. The court held that "dangerous tendency" and words of the statute attempting to set a reasonable standard of guilt were so vague and uncertain that a jury would be warranted in a guilty finding even though the defendant's act may not have any effect for ten, twenty or thirty years. "Dangerous tendency" was not limited. The statute was held invalid and void.

Specification by an "intent" cannot cure vagueness and ambiguity.

In *Herndon* v. *Lowry*, supra, the Georgia Penal Code, section 56, provided: "Any attempt, by persuasion or otherwise, to induce others to join in any combined resistance to the lawful authority of the State shall constitute an attempt to incite insurrection." In invalidating that statute the Court (by Mr. Justice Roberts) said:

> "The power of a state to abridge freedom of speech and of assembly is the exception rather than the rule and the penalizing even of utterance of a defined character must find its justification in a reasonable apprehension of danger to organized government. *The judgment of the legislature is not unfettered. The limitation upon individual liberty must have appropriate relation to the safety of the state. Legislation which goes beyond this need violates the principle of the constitution.*" [Italics added]

See also *Thornhill* v. *Alabama*, supra, where Mr. Justice Murphy in dealing with a similar statute, said as follows:

> " . . . A like threat is inherent in a penal statute, like that in question here, which does not aim specifically at evils within the allowable area of State control but, on the contrary, sweeps within its ambit other activities that in ordinary circumstances constitute an exercise of freedom of speech or of the press. The existence of such a statute, which readily lends itself to harsh and discriminatory enforcement by local prosecuting officials, against particular groups deemed to merit their displeasure, results in a continuous and pervasive restraint on all freedom of discussion that might reasonably be regarded as within its purview. It is not any less effective or, if the restraint is not permissible, less pernicious than the restraint on freedom of discussion imposed by the threat of censorship. An accused, after arrest and conviction under such a statute, does not have to sustain the burden of demonstrating that the State could not constitutionally have written a different and specific statute covering his activities as disclosed by the charge and the evidence introduced against him. *Schneider* v. *State*, 308 U. S. 147, 155, 162-163. Where regulations of the liberty of free discussion are concerned, there are special reasons for observing the rule that it is the statute, and not the accusation or the evidence under it, which prescribes the limits of permissible conduct and warns against transgression. *Stromberg* v. *California*, 283 U. S. 359, 368; *Schneider* v. *State*, 308 U. S. 147, 155, 162-163. Compare *Lanzetta* v. *New Jersey*, 306 U. S. 451."

It is therefore manifest that the statute is vague and indefinite, too general, amounts to a dragnet which may enmesh anyone who engages in a discussion displeasing to others. The statute sets no reasonable, ascertainable stand-

ard of guilt. It is so vague and indeterminate in its boundaries thus set to freedom of speech that it necessarily violates the due process clause of the Fourteenth Amendment.

For this reason the statute is void on its face, and as construed and applied, and the judgment should be reversed and the appellant discharged.

POINT THREE

Evidence as to provocation is admissible as a defense to the offense charged, and if the words spoken are truthful it is complete justification and defense to the offense charged.

We make no extended argument under this point save and except to say that *the truth* if established should have been considered as a defense. It is manifest that according to the erroneous opinion of the New Hampshire Supreme Court, *the truth* is not a defense, that court saying: "The truth would be no justification."

The New Hampshire Supreme Court also erred in holding that evidence of provocation was not admissible. The *res gestae* has always been admissible in evidence on trial of any crime or the judicial determination of any transaction. The acts and conduct of Marshal Bowering and his omissions to perform his duty in the presence of the appellant were admissible evidence. See *Jones on Evidence in Civil Cases*, 4th ed., volume 1, pp. 240-242.

For the error in holding that *the truth* is not a complete defense to the offense charged, the judgment should be reversed and the cause remanded for a new trial.

Also for the error committed in holding that *res gestae* acts of the Marshal and others acting with him or in his presence were not admissible is also ground for reversal of the judgment, and for this reason the cause should be remanded for new trial.

Conclusion

To permit this conviction to stand means the end of free speech and constitutional liberty in this country. Chaplinsky, the appellant, was engaged in a Godly and Christlike work, as an ordained minister of Jehovah God, peaceably and quietly standing on the sidewalk exhibiting literature to passers-by. Because the message contained in the pamphlets and magazines was not suitable to the rabble element of Rochester, including members of the police department, a mob formed and gathered about him, threatening him with violence unless he discontinued his work. He refused to discontinue his lawful and constitutionally guaranteed work, as well as refused to salute the flag, the staff of which had been wrongfully and unjustly used as a spear or javelin in assault against him. He violated no *American* law by thus refusing. He was, therefore, assaulted and beaten in the presence of public officers, one of whom actually participated in such maltreatment, and which officers subsequently arrested him.

Thus it is manifest that the real motive and reason for the arrest of the appellant, Chaplinsky, was the fact that he chose to obey Almighty God and preach the Gospel in spite of mob violence, following exactly in the footsteps of Jesus

Christ's faithful apostle Paul and God's faithful prophet Jeremiah.

Because Chaplinsky was not a coward, but boldly trusted in Jehovah God, Marshal Bowering saw fit to 'frame mischief by law' (Psalm 94:20), knowing that unless he *framed* Chaplinsky, he would be unable to stop his lawful activity.

Under all the facts and circumstances, Chaplinsky was justified in saying what he did say and such utterances were provoked by the police, one of whom participated in the mob.

For the reasons hereinbefore discussed, the judgment of the courts below should be reversed and the appellant discharged, or in the alternative, for procedural errors, the judgment should be reversed and the cause remanded for new trial.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No. 255

■

WALTER CHAPLINSKY, *Appellant*

v.

STATE OF NEW HAMPSHIRE

■

APPEAL FROM THE SUPREME COURT OF THE STATE OF NEW HAMPSHIRE

APPELLANT'S REPLY BRIEF

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No. 255

WALTER CHAPLINSKY, *Appellant*
v.
STATE OF NEW HAMPSHIRE

APPEAL FROM THE SUPREME COURT OF THE STATE OF NEW HAMPSHIRE

APPELLANT'S REPLY BRIEF

As to the construction of the statute, and what acts it does or does not cover, this Court is not concerned and the state court interpretation is usually final. However, this rule does not enjoin this court from determining whether the statute as so construed by the state court violates the Federal Constitution. If so found, it is the duty of this court to reverse the court below. *Henderson* v. *New York*, 92 U.S. 219, 237.

The statute has been construed so as to prohibit the speaking of the truth concerning any matter of public concern when it is offensive to others. The court below says: "The truth would be no justification." (R. 55) The statute prohibits use of words that might start a fight and derisive words which might excite "the addressee to a breach of the peace". (R. 62) It is thus given a broad

and sweeping application so as to cover lawful but offensive words which *are not* profane, immoral, indecent or epithets. The broad generality of the words "offensive", "derisive" and "annoying" is recognized by the court below in these words: *"Though general in a sense,* such words [of the statute] have commonly accepted popular and legal significance."

We have searched the reports and find only one case where a statute similar to this one has been passed upon in light of the Constitution. In that case a statute almost identical with this one was held to be unconstitutional and violative of the United States Constitution. That is the case of *State of New Jersey* v. *August Klapprott et al.*, 22 A. 2d 877, decided December 5, 1941, by the Supreme Court of New Jersey. The statute knocked down in that case reads as follows:

> "Any person who shall, in the presence of two or more persons, in any language, make or utter any speech, statement or declaration, which in any way incites, counsels, promotes, or advocates hatred, abuse, violence or hostility against any group or groups of persons residing or being in this state by reason of race, color, religion or manner of worship, shall be guilty of a misdemeanor."

Klapprott and others were accused of having made anti-Jewish speeches in violation of the statute. Their demurrers to the indictment were overruled and each was sentenced to twelve months in prison and fined. It was held that the statute denied freedom of speech and that the terms of the statute were vague and indefinite, constituting a dragnet, all in violation of the "due process" clause of the United States Constitution.

We submit this decision as persuasive argument in favor of our contentions here. It is directly in point and the entire opinion should be considered by this Court.

The decisions cited and relied upon by appellee are not in point because they are based upon the rules (1) that freedom of speech does not give the right to *"falsely* shout 'fire' in a crowded theatre", and (2) does not authorize use of profane, immoral, indecent words or epithets. Admittedly the exceptions relied upon by appellee to escape the Constitution do not apply here because (1) the words, TRUE, not FALSE, were provoked by addressee's *wrongful* conduct toward appellant and (2) the words were not profane, were not immoral, were not indecent and were not epithets *but were, in the extraordinary circumstances, fair and honest expression of appellant's opinion of the public officers of Rochester, New Hampshire.*

Appellee attempts to make it appear that appellant was purveying 'racial and religious hatred' and invited violence. The record does not support appellee in this contention. On the contrary, the undisputed evidence shows that Chaplinsky was conducting himself in a lawful manner while exercising his constitutional rights. While he was thus engaged, the officers *viewed* the unlawful and criminal assaults committed against Chaplinsky. He was not *first* taken into custody for any unlawful conduct. Those officers failed and refused to arrest Chaplinsky's assailants. Appellee and the court below state that appellant was arrested 'for his own protection'. This admitted and judicially sanctioned action by public officers in restraining Chaplinsky constituted, therefore, a "false" arrest.

Conceding for purpose of argument only that such "false" or "fake" arrest was morally justifiable in the circumstances (by reason of the fact that the officers themselves were physically powerless to shield Chaplinsky against the vastly superior number of mobsters), it is undeniable that the officers' conduct became a violation of their oath of office and the constitutions when they deliberately *transformed* that claimed "false" or "fake"

arrest (for "protection") into a bona fide restraint for purposes of prosecution.

The conduct of Marshal Bowering in taking Chaplinsky into *'protective custody'* is NOW justifiably likened unto the conduct of A. Hitler and B. Mussolini who in recent months have similarly taken defenseless nations and peoples of the minority into *"protective custody"*.

The doctrine of individual liberty, as conceived in this country, is not a privilege reserved for the few. It belongs to all who are living under the government. We submit that the people of the United States should not and will not consent to the abandonment of the very principles upon which this country was founded, while fighting an all-out war to preserve them. Freedom to do right, freedom to speak the truth for a right purpose, is an *American* privilege. In this connection it is well to reflect upon the profound expression of this Court in *Ex parte Milligan*, 4 Wall. 2, 120, and the dissenting words of Mr. Justice Sutherland in *Associated Press* v. *N. L. R. B.*, 301 U.S. 103, 133.

Although it would have been lawful for Chaplinsky to immediately and forcibly resist such unlawful restraint, he, as a minister of Almighty God, chose to physically submit and tolerate the officers' violent manhandling of him, and contented himself with trying to arouse them with bold speech to see the trend of their wrongful conduct toward him. When he discerned that the officers were *seriously* and not "falsely" (i.e., feignedly) arresting him he became righteously indignant. Expression of righteous indignation against wrongdoing is proper and due, because he who follows the Lord Jesus Christ cannot silently look with approval upon wrongdoing. The Scriptural rule is: "Be ye angry, and sin not."—Ephesians 4:26.

Even the court below recognized the unlawful action by the officers in stating that Chaplinsky's resentment might well have extended to the police. (R. 54, 56) In this connection it is interesting to note that other courts

have held, *the fact that speech is likely to produce violence is no ground for suppressing it;*[1] and *it is the duty of the police to protect the one exercising his constitutional right of free speech against those who attack him by arresting the culprits.*[2]

In *Thornhill* v. *Alabama*, 310 U.S. 88, this Court said:

> "The safeguarding of these rights to the ends that men may speak as they think on matters vital to them and that falsehoods may be exposed through the processes of education and discussion is essential to free government . . . . Noxious doctrines in those fields may be refuted and their evil averted by the courageous exercise of the right of free discussion."

The supposed danger which appellee aims to portray, to wit, threatened breach of the peace, is not of sufficient magnitude to warrant the restraint here attempted to be imposed upon the *exercise* of the right "so vital to the maintenance of democratic institutions". (See Freund, "The Police Power," page 133, section 143.) Here the "evil" is not substantive, is not imminent nor of extremely serious degree, is not extremely high, and therefore the utterance is not punishable, especially in view of the unlawful provoking conduct of State's witnesses on the occasion in question.

Here we submit as our argument the entire opinion in the case of *Bridges* v. *State of California* and *Times-Mirror Co. et al.* v. *The Superior Court of California*, Nos. 1 and 3, October Term 1941, decided December 8, 1941, by this Court, 62 S. Ct. 190, which is directly in point.

Here the facts do not show any breach of peace, actual or threatened, caused by appellant. If there were any such, the "proximate cause" thereof is shown to be the action

[1] *Whitney* v. *California*, 274 U.S. 357, 372.

[2] *Dearborn Publishing Co.* v. *Fitzgerald*, 271 F. 479; *American League of Friends of New Germany*, etc. v. *Eastmead*, 116 N.J. Eq. 487.

of the hoodlum friends and coconspirators of the police officials and the chief of police himself. The officials did not do their duty, but violated the law.

Appellee argues that the words employed by Chaplinsky constituted a clear and present danger *especially when stated in the presence of and to the police and public officials.* This statement is frivolous and beside the point. If the officials are lawful and conduct themselves in a proper manner they would not breach the peace because of such utterance. The appellee's argument insults the law-abiding officials and imputes to them that they will not do their duty and keep the peace. We submit that law-abiding officials are the last ones expected to commit a breach of the peace when words of criticism are addressed against them. If such officials are not law-abiding, then we submit that such misconduct of the officials should not be made the basis of conviction of innocent citizens exercising their lawful rights.

It is to be noticed that the statute in question is not narrowly drawn and does not prohibit any specific conduct. It is not confined to that type of speech subject to the police power, but extends to all types of speech. The statute is not a libel statute and does not purport to be a statute punishing breach of peace or threatened breach of the peace. The State of New Hampshire has statutes on such matters in addition to the statute here drawn in question. The "catch all" statute here involved is manifestly construed in an unconstitutional manner, and is void on its face.

On this subject we quote from *Herndon* v. *Lowry,* 301 U. S. 242:

> "The power of a state to abridge freedom of speech and of assembly *is the exception rather than the rule* and the penalizing even of utterances of a defined character must find its justification in a reasonable apprehension of danger to organized

government. The judgment of the legislature is not unfettered. The limitation upon individual liberty must have appropriate relation to the safety of the state. Legislation which goes beyond this need violates the principle of the Constitution. . . .

"After pointing out that peaceful agitation for a change of our form of government is within the guaranteed liberty of speech, we said of the act in question: 'A statute which upon its face, and as authoritatively construed, is so vague and indefinite as to permit the punishment of the fair use of this opportunity is repugnant to the guaranty of liberty contained in the Fourteenth Amendment.' [*Stromberg* v. *California*, 283 U.S. 359, 369]"

The *clear and present danger* rule to be applied by the court is a rule of reason.

It can can be correctly applied only by exercise of good judgment.

And to the exercise of good judgment calmness is, in times of deep feeling and on subjects which excite passion, as essential as fearlessness and honesty.

To reach sound conclusions on the matter of "clear and present danger" the court should bear in mind why a State is, ordinarily, denied the power to prohibit utterances which a vast majority of its citizens believe to be false and fraught with evil consequences. Those who won the independence of these United States believed that the final end of the State was to enable free men to develop their faculties, and that in its government the deliberative forces should prevail over the arbitrary. They valued liberty both as an end and as a means. They believed liberty to be the secret of happiness and courage to be the secret of liberty. They believed that freedom to think as you will and speak as you think are means indispensable to the discovery and spread of political, commercial and Biblical truth; that without free speech and

press and assembly and worship discussion would be futile; that with them discussion affords ordinarily adequate protection against the dissemination of noxious doctrine.

We say that if the statements made by appellant were untrue, then why were they not proved to be false? Why does not someone answer the charges made? The greatest menace to freedom is an inert people, listless and indolent and steeped in lethargy because of a throttled press, and a people frightened into silence.

Public discussion is a public duty and is of convenience, interest and necessity. This is and has been the fundamental principle of the American government until recently when the totalitarian spirit has swept the world resulting in a "few" in this country attempting to fight totalitarian rule abroad by establishing it at home.

The men who founded this country knew that order cannot be secured merely through fear of punishment for its infraction; that it is hazardous to discourage thought, hope, and imagination; that fear breeds repression; that repression breeds hate; that hate menaces stable government; that the path of safety lies in the opportunity to discuss freely supposed grievances, errors and practices in politics and religion and proposed remedies. Believing in the power of reason as applied through public discussion, they eschewed silence coerced by law—the argument of force in its worst form. Recognizing the occasional tyrannies of governing majorities, they amended the Constitution so that free speech, press and worship of Almighty God should be guaranteed.

Fear of serious injury cannot alone justify suppression of free speech, press and worship. Men feared witches and burnt women. It is the function of speech to free men from the bondage of irrational fears. To justify suppression of free speech there must be reasonable ground to fear that the serious evil will result if free speech is practiced. There must be reasonable ground to believe that

the danger apprehended is imminent. There must be reasonable ground to believe that the evil to be prevented is a serious one.

> "But even advocacy of violation (of law), however reprehensible morally, is not a justification for denying free speech where the advocacy falls short of incitement and there is nothing to indicate that the advocacy would be immediately acted on. The wide difference between advocacy and incitement, between preparation and attempt, between assembling and conspiracy, must be borne in mind. In order to support a finding of clear and present danger it must be shown either that immediate serious violence was to be expected or was advocated, or that the past conduct furnished reason to believe that such advocacy was then contemplated.
>
> "Those who won our independence by revolution were not cowards. They did not fear political change. They did not exalt order at the cost of liberty. To courageous, self-reliant men, with confidence in the power of free and fearless reasoning applied through the processes of popular government, no danger flowing from speech can be deemed clear and present, unless the incidence of evil apprehended is so imminent that it may befall before there is opportunity for full discussion. If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence."

The foregoing is from dissenting opinion of Mr. Justice Brandeis in *Whitney* v. *California*, 274 U. S. 357, 372.

CONCLUSION

The violent conduct of Marshal Bowering was nothing short of incitement to a violation of the law, and at most the facts show entrapment of the appellant which, to adopt a quotation of Justice Brandeis, 'places the liberty of every man in the hands of every petty officer.' To sustain the contention of the appellee is to permit sabotage of the liberties of the people and subvert freedom of speech contemplated for protection by the Constitution.

For the reasons above stated in support of the contentions in our main brief, we submit that the judgment should be reversed and the appellant discharged.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No. 255

WALTER CHAPLINSKY,

Appellant,

vs.

THE STATE OF NEW HAMPSHIRE.

APPEAL FROM THE SUPREME COURT OF THE STATE OF NEW HAMPSHIRE.

STATEMENT OPPOSING JURISDICTION AND MOTION TO DISMISS OR AFFIRM.

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Thornhill v. *Alabama*, 310 U. S. 88, 60 Sup. Ct. 736, 84 L. Ed. 1093 (1940) 4

Watch Tower Bible & Tract Society v. *City of Bristol*, 305 U. S. 572, 59 Sup. Ct. 246, 83 L. Ed. 361 (1938) 2

Whitney v. *Cal.*, 274 U. S. 357, 373, 47 Sup. Ct. 641, 71 L. Ed. 1095 (1927) 4

Statute Cited.

N. H. Pub. L., Chap. 378, s. 2 1, 2

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No. 255

WALTER CHAPLINSKY,

Appellant,

vs.

THE STATE OF NEW HAMPSHIRE,

Appellee.

APPEAL FROM THE NEW HAMPSHIRE SUPREME COURT.

APPELLEE'S STATEMENT OPPOSING JURISDICTION.

Pursuant to Rule 12, paragraph 3, Rules of the Supreme Court of the United States, comes now The State of New Hampshire, appellee, in the above entitled case and discloses the following matter making against the jurisdiction of the Supreme Court of the United States as asserted in a statement of the basis of appellate jurisdiction filed by the appellant on June 2, 1941.

Statement of the Case.

Complaint for violation of P. L. c. 378, s. 2. Trial by jury. Verdict of guilty. Divers exceptions taken by the

appellant. Exceptions were overruled in *State* v. *Chaplinsky*, 91 N. H. —, 18 A. 2d. 754 (Decided Mar. 4, 1941) which upheld the conviction of guilty and held that the statute in question was constitutional under the First and Fourteenth Amendments of the United States Constitution.

The complaint alleged in substance that with force and arms, in a public place in Rochester, on Wakefield Street, near the City Hall, the respondent addressed to the City Marshal these offensive, derisive and annoying words; 'You are a God damned racketeer' and 'a damned Fascist and the whole government of Rochester, are Fascists or agents of Fascists'. These words were testified to by several of the State's witnesses. The defendant admitted the words with the exception of the qualifying "God".

The statute (N. H. Pub. L. c. 378, s. 2) involved reads thus:

> "2. No person shall address an offensive, derisive or annoying word to any other person who is lawfully in any street or other public place, nor call him by any offensive or derisive name, nor make any noise or exclamation in his presence and hearing with intent to deride, offend or annoy him, or to prevent him from pursuing his lawful business or occupation."

Argument.

(I) It is submitted by the appellee that the appeal should be dismissed for want of a substantial Federal question.

Watch Tower Bible & Tract Society v. *City of Bristol*, 305 U. S. 572, 59 S. Ct. 246, 83 L. Ed. 361 (1938);
Langston v. *South Carolina*, 311 U. S. 685, 61 S. Ct. 59, 85 L. Ed. 75 (1940);
Hussock v. *People of the State of New York*, 311 U. S. 659, 61 S. Ct. 733, 85 L. Ed. 642 (1941).

(II) The right of the state under its police power to legislate against conduct likely to cause a public breach of

the peace with a view to securing the social interest in an orderly and tranquil society, has never been questioned in the decisions of the United States Supreme Court. On the contrary, for a long time such a power has been taken for granted.

In *Cantwell* v. *Conn.*, 310 U. S. 296, 60 S. Ct. 900, 84 L. Ed. 1213 (1940), the Court said at pages 308 and 310:

> "The offense known as breach of the peace embraces a great variety of conduct destroying or menacing public order and tranquility. It includes not only violent acts but acts and words likely to produce violence in others. No one would have the hardihood to suggest that the principle of freedom of speech sanctions incitement to riot or that religious liberty connotes the privilege to exhort others to physical attack upon those belonging to another sect. When clear and present danger of riot, disorder, interference with traffic upon the public streets, or other immediate threat to public safety, peace, or order appears, the power of the state to prevent or punish is obvious. • • • 'Resort to epithets or personal abuse is not in any proper sense communication of information or opinion safeguarded by the Constitution and its punishment as a criminal act would raise no question under that instrument'."

And in *Hague* v. *Committee for Industrial Organization*, 307 U. S. 496, 515, 516, 59 S. Ct. 954, 83 L. Ed. 1423 (1939), the Court stated:

> "The privilege of a citizen of the United States to use the streets and parks for communication of views on national questions may be regulated in the interests of all; it is not absolute, but relative, and must be exercised in subordination to the general comfort and convenience, and in consonance with peace and good order; • • •."

The denial of certiorari in *Langston* v. *South Carolina* and in *Hussock* v. *People of the State of New York*, *supra*,

may well be considered as a by-product of the above quoted language.

We have here a case where clearly there can be no claim for an opportunity to test the merits of ideas by competition in the market of public opinion. See *Thornhill* v. *Alabama*, 310 U. S. 88, 60 S. Ct. 736, 84 L. Ed. 1093 (1940). To address offensive names to another in a public place is obviously not under the wing of constitutional protection of peaceful and truthful discussion of matters of public interest. Such verbal conduct can only invite personal violence and disturbance of the peace. Public debate does not yet include public name-calling.

Gitlow v. *New York*, 268 U. S. 652, 666, 45 S. Ct. 625, 69 L. Ed. 1138 (1925);

Whitney v. *Cal.*, 274 U. S. 357, 373, 47 S. Ct. 641, 71 L. Ed. 1095 (1927).

(III) The statute is not invalid because of any vagueness or indefiniteness in its terms.

In the opinion of the New Hampshire Supreme Court in the instant case it was said:

> "In this connection, the claim is made that the test of what is offensive is purely subjective in the sense that it is to be determined by the way the addressee reacts to it. The defendant therefore argues that nobody can know what is offensive language, since one man may be offended by words to which another man would take no exception. We have never construed the statute by any such test. The word 'offensive' is not to be defined in terms of what a particular addressee thinks. The legislature had no such vague, shifting test in mind. As was long ago said, they had in mind the tendency of words, not their actual result. the analogy was that of the distinction between civil and criminal libel. *State v. Brown*, 68 N. H. 200.
>
> "The test is what men of common intelligence would understand would be words likely to cause an average addressee to fight. We have never applied the statute

otherwise. The English language has a number of words and expressions which by general consent are 'fighting words' when said without a disarming smile. In common understanding they are offensive in the Websterian sense of being such as to cause resentment, or, as Funk and Wagnalls say perhaps more aptly, adapted to give offense, offense being that which causes anger. Such words, as ordinary men know, are likely to cause a fight. So are threatening profane or obscene revilings. Derisive and annoying words can be taken as coming within the purview of the statute as heretofore interpreted only when they have this characteristic of plainly tending to excite the addressee to a breach of the peace. If the time may ever come when the words 'damned Fascist' will cease to be generally regarded as 'fighting words' when applied face-to-face to an average American, this is not the time. The presiding justice might have been warranted in telling the jury that they were offensive as a matter of law. But since he thought the jury as competent as he to understand the words, he left the question to them.

"The statute, as construed, does no more than prohibit the face-to-face words plainly likely to cause a breach of the peace by the addressee, words whose speaking constitute a breach of the peace by the speaker —including 'classical fighting words,' words in current use less 'classical' but equally likely to cause violence, and other disorderly words, including profanity, obscenity and threats. Men of common intelligence, situated as was Chaplinsky, do not need to guess at its meaning or differ as to its application. See *Connally* v. *Company*, 269 U. S. 385, 391. If the defendant or others might have guessed that less than such words were prohibited, or if they might have differed about what other words, if any, came under the ban, it was open to all to know, as we have heretofore held, that it could not apply except to words likely to cause a breach of the peace when addressed to an individual in a public place. Within the ambit of the statute, one does not

need to guess at what is prohibited, for all men of common intelligence know almost instinctively what are the dangerous words when so addressed.

"The holding of this statute as sufficiently definite is believed to be consistent with the decisions in *Stromberg* v. *California*, 283 U. S. 359, 369 (where the construction given included in the prohibition a fair use of constitutional freedom), in *Herndon* v. *Lowry*, 301 U. S. 242 (where defendants were obliged to exercise the gift of prophecy in order to know the application of the statute), in *Lanzetta* v. *New Jersey*, 306 U. S. 451 (where the defendant did not have the benefit of a permissible construction prior to the act with which he was charged), and in *Thornhill* v. *Alabama*, 310 U. S. 88 (where the prohibition extended to the use of words 'without annoyance or threat of any kind')."

The statute under attack is far different from those requiring a license or a permit to exercise certain privileges in public places. No license or permit is involved in this statute. It simply provides for the punishment of verbal conduct calculated to produce a breach of the peace.

It is, therefore, submitted that this appeal should be dismissed or the judgment below affirmed.

Respectfully,

FRANK R. KENISON,
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State House, Concord, N. H.
ERNEST R. D'AMOURS,
Assistant Attorney-General,
JOHN F. BEAMIS, JR.
County Solicitor.

June 21, 1941.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No. 255

WALTER CHAPLINSKY,

Appellant,

vs.

THE STATE OF NEW HAMPSHIRE,

Appellee.

APPEAL FROM NEW HAMPSHIRE SUPREME COURT.

MOTION TO DISMISS OR AFFIRM.

Now comes The State of New Hampshire, the appellee, herein, by Frank R. Kenison, its duly appointed, qualified and acting Attorney-General, and moves the Supreme Court of the United States to dismiss with costs the appeal taken herein, to wit, by Walter Chaplinsky, appellant, upon the following grounds:

(1) There is want of a substantial Federal question.

(2) It is manifest that the only Federal questions raised by the said appeal have been so explicitly decided by the Supreme Court of the United States in accordance with the decisions of the Supreme Court of the State of New Hampshire, as to foreclose further argument on the subject.

(3) It is clear that the decision of the Supreme Court of the State of New Hampshire, affirming the convictions of guilty, denying the appellant's exceptions and upholding the constitutionality of the New Hampshire statute is correct.

In the alternative, appellee moves this Court to affirm the judgment from which the appeal in the above entitled cause purports to be taken on the three grounds heretofore mentioned in the appellee's motion to dismiss.

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ERNEST R. D'AMOURS,
Assistant Attorney-General,
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June 21, 1941.

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In the Supreme Court of the United States

October Term, 1941

No. 255

WALTER CHAPLINSKY,
Appellant,

vs.

THE STATE OF NEW HAMPSHIRE,
Appellee.

APPEAL FROM THE SUPREME COURT OF
THE STATE OF NEW HAMPSHIRE

APPELLEE'S BRIEF

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In the Supreme Court of the United States

October Term, 1941

No. 255

WALTER CHAPLINSKY,
Appellant,

vs.

THE STATE OF NEW HAMPSHIRE,
Appellee.

APPEAL FROM THE SUPREME COURT OF THE STATE OF NEW HAMPSHIRE

APPELLEE'S BRIEF

OPINION IN COURT BELOW.

The opinion of the Supreme Court of New Hampshire will be found in 91 N. H.—, 18 A. 2d. 754 (Dec'd Mar. 4, 1941, R. 51-64 inclusive).

JURISDICTION.

Jurisdiction of the Supreme Court of the United States is invoked by appellant under s. 237 (a) of the Judicial Code [28 U.S.C. 344 (a)], and under c. 14 of the Act of Congress of January 31, 1928, 45 Stat. 54, and under c. 440 of the Act of Congress of April 26, 1928, 45 Stat. 466.

Jurisdiction should not be taken in view of the following cases:

Watch Tower Bible & Tract Society v. *City of Bristol*, 305 U. S. 572,

Cantwell v. *Connecticut*, 310 U. S. 296,

Hussock v. *People of the State of New York*, 311 U. S. 659,

Langston v. *South Carolina*, 311 U. S. 685,

Bevins v. *Prindable*, 314 U. S.—, 86 L. Ed. (adv.) 54.

STATEMENT OF THE CASE.

The New Hampshire statute involved here is found in the Public Laws of New Hampshire (1926) c. 378, s. 2, which provides:

> "2. Derisive Words. No person shall address any offensive, derisive or annoying word to any other person who is lawfully in any street or other public place, nor call him by any offensive or derisive name, nor make any noise or exclamation in his presence and hearing with intent to deride, offend or annoy him, or to prevent him from pursuing his lawful business or occupation."

The complaint against the appellant read as follows: "County of Strafford, aforesaid, with force and arms, in a certain public place in said City of Rochester, to wit, on the public sidewalk on the easterly side of Wakefield Street, near unto the entrance of the City Hall, did unlawfully repeat, the words following, addressed to the complainant, that is to say, 'You are a God damned racketeer' and 'a damned Fascist and the whole government of Rochester are Fascists or agents of Fascists' the same being offensive, derisive and annoying words and names." (R. 1.)

A verdict of guilty was returned by the jury. (R. 50), and the appellant's bill of exceptions (R. 1-4) was allowed and the law questions raised were transferred to the Supreme Court of New Hampshire. The exceptions were overruled (R. 51, 64) and the statute was held constitutional. The case is here on appellant's petition for appeal (R. 64-67 inclusive) which was allowed. (R. 67-68).

The situation brought out at the trial is not accurately described in appellant's statement of the case. His recital of the facts is based almost exclusively on the testimony of his witnesses. That testimony was contradicted in many respects. Particularly unjustified is appellant's recital on page 3 of his brief: "While appellant was thus engaged in his work, a mob formed around him on the sidewalk, a tumultuous crowd of about fifty or sixty persons objected to his work and threatened him with violence if he did not discontinue."

The facts probably found by the jury can be fairly described in substance as follows:

On Saturday afternoon, April 6, 1940, the appellant was engaged in selling and distributing literature of the sect known as Jehovah's Witnesses, in the public streets (R. 7) of the city of Rochester, particularly at Central Square where traffic was heavy (R. 14) and a lot of people passed by in the course of the Saturday afternoon shopping. (R. 5, 6, 11, 33, 41). Other people were standing as usual about the corner and along the buildings and doing nothing in particular. (R. 14). The appellant announced his literature in terms having a tendency to irritate the people by calling "racketeers" priests and those of their faith. (R. 15, 19). Numerous complaints were made to the City Marshal who warned the appellant that the people were getting into an ugly mood as a result of his public announcements with reference to priests and religion. (R. 6, 9, 10, 11, 12, 15, 16, 19). A short while later the Marshal was advised by

a man passing by in a car that there was what he thought was a riot at the Square. (R. 12, 30). On his way to the point of trouble, he met two officers taking the appellant to the Police Station (R. 12) "more for his protection than for arrest" (R. 54). He reminded the appellant of his earlier warning in the afternoon that the people might get out of hand if he continued using the language he had with reference to their faith and priests. (R. 6, 9, 16, 20). Whereupon the appellant addressed to the Marshal the words described in the complaint (R. 1) and he was placed under arrest. (R. 13, 54).

The evidence concerning the nature of the riot at Central Square is conflicting but all witnesses for the state testified that they did not participate in a riot or in any way provoked, annoyed or abused the appellant. R. passim.

Officer Lapierre observed a number of persons around the appellant who was down on one knee. He went to the scene, picked him up and started with him for the Police Station apparently for his protection. (R. 5, 54). That some disturbance occurred as a result of a salty exchange of epithets between the appellant and a member of the public is not questioned. (R. 16, 18). But that this disturbance amounted to a riot produced by mob action is not borne out by the record.

SUMMARY OF ARGUMENT.

The appellee contends that the statute here involved is not unconstitutional for the following reasons:

The statute has been construed by the state court as a proper subject for the exercise of the state police power, since its aim is the promotion of the social interest in public order. The construction placed by the state court on the statute justifies the appellant's conviction and makes immaterial the evidence of provocation offered by him.

As for the statute, it is not too vague and indefinite since, in the nature of things, all-inclusive legislative description of verbal conduct likely to annoy, deride and offend with resulting breach of peace is well-nigh impossible. Common experience in the context of the life of any given community would indicate to the person of common intelligence what words are annoying, deriding, offensive and likely to cause another person to whom they are addressed to fight.

Nor does the statute violate appellant's right to the free exposition of his ideas, because the verbal conduct it prohibits bears no appropriate relationship to freedom of discussion in the process of attaining and disseminating truth.

POINTS FOR ARGUMENT

POINT ONE.

THE STATUTE AS CONSTRUED BY THE STATE COURT IS A PROPER SUBJECT FOR THE REASONABLE EXERCISE OF THE STATE POLICE POWER AND AS APPLIED TO THE APPELLANT CONSTITUTES AN ADEQUATE AND CONSTITUTIONAL BASIS FOR HIS CONVICTION.

POINT TWO.

THE STATUTE AS CONSTRUED AND APPLIED TO APPELLANT DOES NOT SET UP AN UNCONSTITUTIONAL STANDARD OF CRIMINALITY IN VIOLATION OF DUE PROCESS.

POINT THREE.

THE STATUTE AS CONSTRUED AND APPLIED TO APPELLANT DOES NOT DEPRIVE HIM OF HIS RIGHT OF FREEDOM OF SPEECH GUARANTEED BY THE UNITED STATES CONSTITUTION.

ARGUMENT

POINT ONE.

THE STATUTE AS CONSTRUED BY THE STATE COURT IS A PROPER SUBJECT FOR THE REASONABLE EXERCISE OF THE STATE POLICE POWER AND AS APPLIED TO THE APPELLANT CONSTITUTES AN ADEQUATE AND CONSTITUTIONAL BASIS FOR HIS CONVICTION.

The challenged statute may be divided into two parts. One prohibits words and names addressed to another in a public place; the other considers an offense noises or exclamations made with intent to deride, offend, or annoy. The defendant Chaplinsky was charged with, tried and convicted for a violation of the first part of the statute prohibiting offensive, derisive or annoying words in a public place.

The purpose of the statute here in question is to preserve the public peace. See *State* v. *McConnell*, 70 N. H. 294, where the Court said: "The purpose of the act seems to have been to insure to persons freedom in the pursuit of their lawful occupation . . . The purpose . . . was to preserve the public peace . . . " p. 294. . . . "The wound, fear, or spirit of revenge produced by the language does not depend upon the locality where it is used." p. 295. See also *State* v. *Brown*, 68 N. H. 200, where the act was given the same construction. In the *McConnell* case, the complainant was called a "bitch" and other obscene names. In the *Brown* case, the defendant called another a "God damned blackmailer". In both cases, the conviction was upheld by the New Hampshire Supreme Court.

In the case of *State* v. *Brown, supra*, the defense of truth was held inadmissible under the statute, since no distinction was made between truthful and untruthful utterances. This decision also does not require any intent other than that to speak the words prohibited by the statute. That is the construction again adopted by the New Hampshire Supreme Court which said:

> "It thus appears that long before the words for which [fol. 41] Chaplinsky was convicted, the construction of the provision was made plain, to the extent that no words were forbidden except such as have a direct tendency to cause acts of violence by the persons to whom, individually, the remark is addressed. This is not a case where, in advance of a judicial interpretation, the defendant could not be bound to understand what was intended by the statute. See, *Lanzetta* v. *New Jersey*, 306 U. S. 451, 456." (R. 53).

That construction is binding on this Court since the highest state court is the final authority on state law. *Minnesota* v *Probate Court*, 309 U. S. 270; *Fidelity Trust Co.* v. *Field*, 311 U. S. 169; *Six Companies* v. *Highway District*, 311 U. S. 180; *West* v. *A. T. & T. Co.*, 311 U. S. 211. That protection of public order is a proper sphere for the exercise of the state police power is too well settled to require a lengthy citation of authorities. See *Thornhill* v. *Alabama*, 310 U. S. 88, and *Drivers Union* v. *Meadowmoor Co.*, 312 U. S. 275, where the Court said in substance that a state may legislate against conduct menacing the peace without violating due process.

In applying to the appellant the statute as construed, the Court below took the position that the words used had in fact a clear and present tendency to produce a breach of the peace and that besides they were in and of themselves a breach of the peace. In referring to the appellant's comment addressed to the Marshal, the Court below said "Its plain tendency was to further breach of order, and it was itself a breach of the peace." (R. 54). The Court also held that provocation, if any, could not justify the appellant in violating the statute. The offensive words calculated to cause a breach of the peace, the intent to speak them, addressing them to another person lawfully in the street, being

the elements present, the statute was violated regardless of the truth of the words spoken and irrespective of the provoking circumstances alleged. In this connection the Court below said:

> "The rule thus established is not severe. Chaplinsky could no more defend unlawful speech on the ground of provocation than could one of the street-crowd have defended a charge of calling Chaplinsky names on the ground that the name-caller had been incensed by Chaplinsky's teachings. The defendant was held to the same duties as those who disagreed with him or with whom he disagreed. The rules of fair conduct in public speech in the street apply indiscriminately to all—whether the speaker be a preacher, an official or a mere by-stander." (R. 55).

This applied construction is also binding here since state law does not operate in vacuo but grows out of the facts as found and interpreted by the court below.

That statutes directed against conduct calculated to produce a breach of the peace and considered in and of itself a breach of the peace are within the realm of the state's police power is a proposition overwhelmingly supported by the cases decided by this court. See, *Cantwell* v. *Connecticut*, supra, p. 308, where the court said: "When . . . immediate threat to public safety, peace, or order appears, the power of the state to prevent or punish is obvious."

The words of the appellant were offensive, derisive and annoying within the meaning of the statute. Racketeers are considered persons of anti-social behavior, violators of the law, exploiters, promoters of white slavery, defrauders and what not. Fascists are looked upon in this Nation as persons who achieve their ends by terrorism and resort to might. Both expressions are well calculated to cause a

breach of peace, especially when addressed to an officer in the performance of his duties. Such language can hardly be considered "in any proper sense communication of information or opinion and safeguarded by the constitution" to quote Mr. Justice Roberts in the *Cantwell* case, p. 310. See *Levy* v. *Gelber*, 175 Misc. 746, 25 N.Y.S. 2d. 148, where calling another a "Nazi and Communist" was held slanderous. For cases holding that opprobrious words whether slanderous or otherwise offensive are a breach of peace when addressed to policemen, See 34 A. L. R. 566. Whether the word "racketeer" means illegitimate occupation, trick or dodge, was left to the jury to decide in *Finkle* v. *Westchester*, 256 N.Y.S. 908, 235 App. Div. 817. See also, *State* v. *McGlone*, D. C. Pa. 19 F. Supp. 285, 287, where racketeering was defined as the organized use of threats, coercion, intimidation and use of violence to compel someone to do this or that.

The commendable solicitude for civil liberties evidenced in recent cases of this court is "necessarily limited to situations where the police regulation could be effectively achieved without limiting these liberties." *53 Harv. L. R.* 487, 488 (1940). To be solicitous of the civil liberties of Jehovah's Witnesses on the record in this case is to deny the same solicitude to other people rightfully in the highways and other public places who may demand the right to speak non-offensive and non-opprobrious words to their listeners. Jehovah's Witnesses tend to overlook the fact that their right to speak must necessarily be subject to reasonable regulations allowing all other persons the same rights subject to the same general non-discriminatory regulations making for municipal tranquillity.

It must be remembered that the statute in question here is merely one of the ways provided by the New Hampshire legislature for the punishment of breach of the peace and offenses against the police of towns. Both at common law

in England and in the United States, the state under its police power has been able constitutionally to prohibit offensive language calculated to cause disorder and violence. There is nothing in any decision of this court that gives any countenance to the thought that freedom of speech includes the right to commit verbal crimes or torts at common law. "We can, of course, be sure that certain forms of utterance, which have always been crimes or torts at common law, are not within the scope of the free speech clauses." Chafee, *Freedom of Speech in Wartime*, 32 Harv. L. R. 932, 943 (1919).

The words spoken by Chaplinsky in this case were opprobrious, vituperative, slanderous and offensive. They were also obviously profane and illegal. Public Laws of N. H. (1926), c. 385, s. 2. It was the type of non-informative utterance that was calculated to cause violence and in this case to cause a breach of the peace. It is just such statements that have been condemned by the highest courts of this country for years and years as being punishable by appropriate criminal statutes. We know that a man cannot claim protection under the free speech clause by falsely shouting "fire" in a theater. As Mr. Justice Holmes said in *Schenck* v. *United States*, 249 U. S. 47, 52, "The most stringent protection of free speech would not protect a man in falsely shouting fire in a theater and causing a panic." By the same reasoning the most stringent protection of free speech should not protect Chaplinsky in falsely accusing a police officer in the performance of his duty of offensive false charges which tended to cause disorder and in fact did cause disorder with some possible resulting injury to the speaker of the words. It seems impossible on this record to conceive that Jehovah's Witnesses or any other sect are entitled to disregard those well accepted norms for maintaining municipal peace and order The Constitution of the United States would not indicate

that such a right existed and certainly if it does exist, it should be properly subordinated to the more important, serious and fundamental need of maintaining social order.

POINT TWO.

THE STATUTE AS CONSTRUED AND APPLIED TO THE APPELLANT DOES NOT SET UP AN UNCONSTITUTIONAL STANDARD OF CRIMINALITY IN VIOLATION OF DUE PROCESS.

The test of criminality under the statute is not a subjective one as the appellant claims. Rather is it that the statute contemplates, "what men of common intelligence would understand would be words likely to cause an average addressee to fight." Opinion of the Court below. (R. 62). Such a tendency of any given verbal conduct is "as susceptible of proof as many of the criteria constantly applied in prosecutions for crime." *Minnesota* v. *Probate Court*, supra, p. 274.

In *Nash* v. *United States*, 229 U. S. 373, it was held that the term "every" in the prohibition against every combination, contract or conspiracy in restraint of interstate trade was not so vague as to be inoperative on the criminal side. Mr. Justice Holmes, speaking for the Court, said:

> "It is said that the crime thus defined by the statute contains in its definition an element of degree as to which estimates may differ, with the result that a man might find himself in prison because his honest judgment did not anticipate that of a jury of less competent men (page 376) . . .
>
> "But, apart from the common law as to restraint of trade thus taken up by the statute, the law is full of instances where a man's fate depends on his estimating rightly, that is, as the jury subsequently estimates it, some matter of degree. If his judgment is wrong, not

only may he incur a fine or short imprisonment, as here; he may incur the penalty of death. 'An act causing death may be murder, manslaughter, or misadventure, according to the degree of danger attending it' by common experience in the circumstances known to the actor. 'The very meaning of the fiction of implied malice in such cases at common law was, that a man might have to answer with his life for consequences which he neither intended nor forsaw.' (Cases cited). 'The criterion in such cases is to examine whether common social duty would, under the circumstances, have suggested a more circumspect conduct.' (Cases cited). If a man should kill another by driving an automobile furiously into a crowd, he might be convicted of murder however little he expected the result. (Cases cited). If he did no more than drive negligently through a street, he might get off with manslaughter or less."

See also *Bandini Petroleum Co. et al* v. *Superior Court*, 284 U. S. 8. ("Unreasonable waste of natural gas" held not too broad).

Miller v. *Oregon*, 273 U. S. 657, where the Court upheld a statute prohibiting any person from operating an automobile at a rate of speed that will endanger property, life or limb.

Sproles v. *Binford*, 286 U. S. 374, 393, where the Court said: "The use of common experience as a glossary is necessary to meet the practical demands of legislation."

Lloyd v. *Dollison*, 194 U. S. 445, 450, (Liquor restrictions varying according to sale at "wholesale" or "retail").

Waters-Pierce Oil Co. v. *Texas* (No. 1), 212 U. S. 89, 108-111. (Contracts "reasonably calculated" or which "tend" to fix prices).

Omdechevarria v. *Idaho*, 246 U. S. 343, 345, 348. ("Any cattle range previously . . . or . . . usually occupied by any cattle grower").

Hygrade Provision Co. v. *Sherman*, 266 U. S. 497, 501-503. (Meat represented to be "kosher").

United States v. *Alford*, 274 U. S. 264, 267. (Building fires "near any forest or inflammable material).

United States v. *Wurzbach*, 280 U. S. 396. (Receiving contributions for "any political purpose whatever").

United States v. *Shreveport Grain & Elevator Co.*, 287 U. S. 77, 81-82. ("Reasonable variations" in weight or measure).

Kay v. *United States*, 303 U. S. 1, 8-9. ("ordinary fees . . . for services rendered").

Gorin v. *United States*, 312 U. S. 19. (Obtaining information respecting the "national defense").

The reports are full of instances where a man is held to the peril of an indictment for conduct which by common law and experience is recognized as forbidden behavior. It is true that the average man cannot be held to the peril of imprisonment for the unwise exercise of his economic or business knowledge which involves so many factors of varying effect such as in the case of *Connally* v. *General Construction Company*, 269 U. S. 385, where the language was "current rate of per diem wages," or of *Cline* v. *Frink Dairy Company*, 274 U. S. 445, where the interpretation of "reasonable profit" was involved, or of *United States* v. *Cohen Grocery Co.*, 255 U. S. 81, where selling at "unreasonably low prices" was thought too vague.

In other words, this Court has laid down a distinction between situations calling for the rule in the *Nash* case and circumstances making the rule in the *Cohen* case applicable. Where the meaning of the statute may be derived from

the common law or common experience, the *Nash* case applies. Where the language has no judicial background and is not grounded in common experience the *Cohen* case obtains.

It is submitted that just as it is impossible to include by specific description in precise and all inclusive definitions, all the acts which fall within the meaning and purpose of the words "trade," "commerce," "trust," "restraint," "monopoly," "reasonable," "wholesale," "usually," "dangerous," and "near," so is it impracticable to require legislative enumeration of all words which might prove annoying, derisive, offensive and calculated to produce a breach of peace in any given community.

With reference to this point, the Court below stated:

> "'The holding of this statute as sufficiently definite is believed to be consistent with the decisions in *Stromberg* v. *California*, 283 U. S. 359, 369 (where the construction given included in the prohibition a fair use of constitutional freedom), in *Herndon* v. *Lowry*, 301 U. S. 242 (where defendants were obliged to exercise the gift of prophecy in order to know the application of the statute), in *Lanzetta* v. *New Jersey*, 306 U. S. 451 (where the defendant did not have the benefit of a permissible construction prior to the act with which he was charged), and in *Thornhill* v. *Alabama*, 310 U. S. 88 (where the prohibition extended to the use of words 'without annoyance or threat of any kind').
>
> "The words 'offensive,' 'derisive' and 'annoying,' in this connection of tendency to disorder in public places, are commonly used and commonly understood. They are not wanting in meaning. [illegible] are used in statements of legal principles by those who are careful of accuracy and definiteness of statement. Thus, 'per-

sonally offensive' language, 'profane, indecent or abusive remarks directed to the person of the hearer', and 'epithets or personal abuse', all of which are caught up in the phrase 'words [fol. 55] likely to produce violence in others.' *Cantwell* v. *Connecticut, supra.* Though general in a sense, such words have commonly accepted popular and legal significance. When one speaks of publicizing 'without annoyance or threat of any kind' (*Thornhill* v. *Alabama, supra*) he is not to be misunderstood, even though 'without just or legal excuse' are words without ascertainable meaning. And so reference to an injunction prohibiting officials from interfering with the right of speakers 'in an orderly and peaceable manner' is definite, because everybody understands what 'orderly and peaceable' means. *Hague* v. *C. I. O.*, 307 U. S. 496, 517. Likewise, any intelligent person may understand the prohibition of our statute as it has always been construed. Equally clear is the phrase 'matter obscene or offensive to public morals', or the phrase 'disorderly conduct' (*Lovell* v. *Griffin*, 303 U. S. 444).

"Finally, no person situated as was Chaplinsky, is left in any forbidden sense to guess what a jury will guess. Neither he nor the jury is faced with uncertainty in any other sense than would be the case if the charge were negligent conduct, where the test is that of average conduct or gross negligence. Our statute deals 'with the actual, not with an imaginary condition other than the facts.' *International Harvester Company*, 234 U. S. 217, 223. And it deals with those facts upon the basis of tendencies of words used face-to-face in public places which are matters of common knowledge and appreciation." (R. 63-64).

POINT THREE.

THE STATUTE AS CONSTRUED AND APPLIED TO APPELLANT DOES NOT DEPRIVE HIM OF HIS RIGHT OF FREEDOM OF SPEECH GUARANTEED BY THE UNITED STATES CONSTITUTION.

First of all, a distinction must be made between legislative action directed against free expression of ideas under the guise of the exercise of state police power and similar action having an appropriate relationship to the safety and order of the state with incidental effect upon the exercise of free speech. Every free speech problem requires us to balance the individual and social interests against some other social interest such, for example, as national defense or public order.

Criminal law is generally directed against acts and actual injuries. Such injuries may result from verbal conduct as well as from overt acts. No one could contest the constitutional validity of the statutes making punishable the use of obscene, profane and libelous language. The listener, reader, or victim is injured and provoked to a breach of the peace by such language. In his recent work on "*Free Speech in the United States*," (1941) Zechariah Chafee, Jr. stated that verbal peace time crimes "are too well recognized to question their constitutional. . . ." (p. 149), and that indecent talk does not "form an essential part of any exposition of ideas," and does "have a very slight social value as a step toward truth which is clearly outweighed by the social interests in our morality of the young, and the peace of mind of those who hear and see." p. 150. "Words of this type," Professor Chafee writes, "offer little opportunity for the usual process of counter-argument. . . . Insults are punished like a threatening gesture, since they are liable to provoke a fight. p. 150.

That principal was recognized in *Cantwell* v. *Connecticut*, *supra*, where the Court said:

> "The offense known as breach of the peace embraces a great variety of conduct destroying or menacing public order and tranquillity. It inclures not only violent acts but acts and words likely to produce violence in others. No one would have the hardihood to suggest that the principle of freedom of speech sanctions incitement to riot or that religious liberty connotes the privilege to exhort others to physical attack upon those belonging to another sect. When clear and present danger of riot, disorder, interference with traffic upon the public streets, or other immediate threat to public safety, peace, or order, appears, the power of the state to prevent or punish is obvious." p. 308. . . . "One may, however, be guilty of the offense if he commit acts or make statements likely to provoke violence and disturbance of good order, even though no such eventuality be intended. Decisions to this effect are many, but examination discloses that, in practically all, the provocative language which was held to amount to a breach of the peace consisted of profane, indecent, or abusive remarks directed to the person of the hearer. *Resort to epithets or personal abuse is not in any proper sense communication of information or opinion safeguarded by the Constitution and its punishment as a criminal act would raise no question under that instrument.*" p. 309, 310.

The case at bar is clearly distinguishable from *Lovell* v. *Griffin*, 303 U. S. 444, where the only social interest advanced against that of free speech was the desirability of urban cleanliness. Such a social interest, to be sure, is nothing compared to the social interest in public order and safety involved here. A substantial difference also exists

between the instant case and cases like *Thornhill* v. *Alabama, supra*, and *Cantwell* v. *Connecticut, supra*. In the Thornhill case, the Court found no breach of the peace in the fact that a picketer in the presence of six or eight others simply urged two employees not to go to work. Such publicizing of a labor dispute in a peaceful appeal to persuasion is not language that is condemned by the New Hampshire statute. In the *Cantwell* case, the Court found that the conduct of the appellant did not amount to a breach of the peace because no truculent bearing, discourtesy or personal abuse was found in the evidence reported.

The case at bar resembles more the cases of *Drivers Union* v. *Meadowmoor Co. supra* and of *Cox* v. *New Hampshire*, 312 U. S. 569. In both cases the securing of the social interests in public order and peace was made to prevail over the social interest in free discussion of public subjects. In the *Cox* case, the requirement that a permit be obtained to conduct a parade in the public streets of a city was held not to deprive the paraders from their right to publicize freely their ideas about religion. In the *Drivers Union* case, the Court went even farther. It held that a perfectly constitutional device—peaceful picketing—may become unconstitutional when it is employed to express ideas in the "context of violence".

If free rein is not given to communication of thought against the requirements of public peace and safety, *a fortiori* must the channel of free expression be closed to language which conveys no meaning subject to the usual process of counter-argument, but simply constitutes insults inflicting injury upon the listener. The freedom of discussion guaranteed by the Constitution embraces only "issues about which information is needed or appropriate to enable the members of society to cope with the exigencies of their period." *Thornhill* v. *Alabama*, supra, p. 102. The appellant cannot claim that he is engaging in a "free trade in

ideas" when he calls a law enforcement officer a "God damned racketeer and a damned Fascist," nor can he claim for such insults the liberty "to get [them] accepted in the competition of the market." See, Mr. Justice Holmes in *Schenck* v. *United States*, 249 U. S. 47, 52; *Abrams* v. *United States*, 250 U. S. 616, 630. Free public debate does not yet include name-calling under the wing of its constitutional protection. The "emotive function" of language such as was used by appellant must be distinguished from the "communicative function" of free expression protected by the Constitution. As was stated in the opinion of the Court below:

> "The only competition for acceptance in that market of opinion to be found in this record is this: the defendant admittedly called the Marshal a damned racketeer and Fascist, in exchange, as the defendant says, for the Marshal's calling him a damned bastard. Either appellation, applied directly to the other on the street, would clearly be a breach of the statute. Neither would rise above the level of name-calling. Neither party could expect the other to be persuaded by such language. Neither remark qualifies as peaceful and truthful discussion of matters of public interest. Each invited personal violence and disturbance of the peace, without any observable tendency to enable the bystanders to test the merits of the competitive ideas, if they were ideas. We can see no relationship of such utterances to that freedom of speech which is so acutely desirable if free institutions are to be preserved. Such face-to-face reviling is not remotely necessary in the debate of public questions. It is not argument. It has no persuasive power. Its only power is to inflame, to endanger that calm and useful consideration of public problems which is the protection of free government.

Its tendency is to useless and dangerous disorder in which the object of free speech is lost to view." (R. 56, 57).

To state it another way, if even unabusive language does not enjoy an absolute constitutional immunity, how much less absolute should be the right to use abusive language which always produces a clear and present danger of producing a public disturbance.

It is respectfully submitted that Jehovah's Witnesses erroneously consider the right of free speech as absolute. This finds no constitutional support, either in the past or present decisions of this court. The thought is well expressed by Mr. Justice McKenna in *Schaefer* v. *United States*, 251 U. S. 466, 474, when he said, "Free speech is not an absolute right, and when it or any right becomes wrong by excess is somewhat elusive of definition." That free speech is relative and is subject to some limitations is acknowledged in *Schneider* v. *State*, 308 U. S. 147, 160-161. We know that the manner of exercising the right of free speech may be regulated although not suppressed. *Cox* v. *New Hampshire*, 312 U. S. 569. We know that free speech does not include the right to "resort to epithets or personal abuse." *Cantwell* v. *Connecticut*, 310 U. S. 296, 309-310. We also know that other civil liberties may be properly subordinated to the more fundamental need for national unity. *Minersville School District* v. *Gobitis*, 310 U. S. 586. All of these cases clearly demonstrate the proposition that freedom of speech is relative and not absolute. It also demonstrates the proposition that a slight general non-discriminatory regulation of free speech is inferior to some other right of greater social value such as municipal order on streets and public highways.

The appellant in asserting his rights of free speech should not do so at the expense of the rest of the community who

are required to exercise this right in a non-criminal manner. The appellant should not be allowed to use profane and slanderous words and commit other torts in exercising his civil liberties. Nor should he be allowed the right to commit a breach of the peace or a violation of a non-discriminatory penal statute having a reasonable tendency to protect and foster municipal order and peace in public places. In times of stress civil rights are perhaps of greater importance because of the tendency to overlook their enduring and fundamental value. But it cannot be denied that civil rights in times of stress can only be protected by an orderly enforcement of the law. See, Attorney General Biddle in *"Civil Rights in Times of Stress,"* 2 Bill of Rights Review 13, 22 (1941).

The State of New Hampshire has not attempted in this case to deprive the appellant of any of his civil liberties. We have taken the position that neither he nor anyone else will be able to enjoy these liberties if they are to be exercised unlawfully and without any regard to the corresponding rights of their fellow citizens. On the record in this case, it would be proper to say that the "legislatures are ultimate guardians of the liberties and welfare of the people in quite as great a degree as the courts." *Missouri K. & T. R. Co. v. May*, 194 U. S. 267, 270.

CONCLUSION

In appraising and balancing the social interest in essential free expression against the social interest in the none-less-essential public order and peace, it is respectfully submitted that New Hampshire's power to condemn name-calling in the public streets should be made to prevail over the appellant's interest in calling a city marshal a "God damned racketeer and a damned Fascist." These words obviously are abusive, offensive and are genuinely calculated, as intended by the appellant, to annoy, offend and deride. Such words

were reasonably calculated to cause a breach of the peace and did in fact result in a breach of the peace. If by some test not yet known the words spoken by the appellant to a law enforcement officer are not derisive and offensive, they certainly have no tendency to please anyone going lawfully about his business on public streets.

While it is of great importance for the survival of Democratic institutions that civil liberties be preserved, it is equally essential for the very assurance of such civil liberties that those Democratic institutions themselves be maintained in an atmosphere of public order and peace. See, 1 *Bill of Rights Review*, 310, 312 (1941). Freedom of expression would be illusory without the corresponding stability of public peace. If appellant's civil liberties are to be protected for him, they must be safeguarded by his government whether federal, state or local. It is for the legislature or the court to say how far is too far in determining the limits of free speech in a civilized community.

Respectfully submitted,

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December 27, 1941.

SUPREME COURT OF THE UNITED STATES.

No. 255.—October Term, 1941.

Walter Chaplinsky, Appellant, *vs.* State of New Hampshire. } Appeal from the Supreme Court of the State of New Hampshire.

[March 9, 1942.]

Mr. Justice Murphy delivered the opinion of the Court.

Appellant, a member of the sect known as Jehovah's Witnesses, was convicted in the municipal court of Rochester, New Hampshire, for violation of Chapter 378, Section 2, of the Public Laws of New Hampshire:

"No person shall address any offensive, derisive or annoying word to any other person who is lawfully in any street or other public place, nor call him by any offensive or derisive name, nor make any noise or exclamation in his presence and hearing with intent to deride, offend or annoy him, or to prevent him from pursuing his lawful business or occupation."

The complaint charged that appellant "with force and arms, in a certain public place in said city of Rochester, to wit, on the public sidewalk on the easterly side of Wakefield Street, near unto the entrance of the City Hall, did unlawfully repeat, the words following, addressed to the complainant, that is to say, 'You are a God damned racketeer' and 'a damned Fascist and the whole government of Rochester are Fascists or agents of Fascists' the same being offensive, derisive and annoying words and names".

Upon appeal there was a trial de novo of appellant before a jury in the Superior Court. He was found guilty and the judgment of conviction was affirmed by the Supreme Court of the State. 91 N. H. —, 18 A. 2d 754.

By motions and exceptions, appellant raised the questions that the statute was invalid under the Fourteenth Amendment of the Constitution of the United States in that it placed an unreasonable restraint on freedom of speech, freedom of the press, and freedom of worship, and because it was vague and indefinite. These contentions were overruled and the case comes here on appeal.

There is no substantial dispute over the facts. Chaplinsky was distributing the literature of his sect on the streets of Rochester on a busy Saturday afternoon. Members of the local citizenry complained to the City Marshal, Bowering, that Chaplinsky was denouncing all religion as a "racket". Bowering told them that Chaplinsky was lawfully engaged, and then warned Chaplinsky that the crowd was getting restless. Some time later a disturbance occurred and the traffic officer on duty at the busy intersection started with Chaplinsky for the police station, but did not inform him that he was under arrest or that he was going to be arrested. On the way they encountered Marshal Bowering who had been advised that a riot was under way and was therefore hurrying to the scene. Bowering repeated his earlier warning to Chaplinsky who then addressed to Bowering the words set forth in the complaint.

Chaplinsky's version of the affair was slightly different. He testified that when he met Bowering, he asked him to arrest the ones responsible for the disturbance. In reply Bowering cursed him and told him to come along. Appellant admitted that he said the words charged in the complaint with the exception of the name of the Deity.

Over appellant's objection the trial court excluded as immaterial testimony relating to appellant's mission "to preach the true facts of the Bible", his treatment at the hands of the crowd, and the alleged neglect of duty on the part of the police. This action was approved by the court below which held that neither provocation nor the truth of the utterance would constitute a defense to the charge.

It is now clear that "Freedom of speech and freedom of the press, which are protected by the First Amendment from infringement by Congress, are among the fundamental personal rights and liberties which are protected by the Fourteenth Amendment from invasion by state action". *Lovell* v. *Griffin*, 303 U. S. 444, 450.[1]

[1] See also Bridges v. California, 314 U. S. —, decided December 8, 1941; Cantwell v. Connecticut, 310 U. S. 296, 303; Thornhill v. Alabama, 310 U. S. 88, 95; Schneider v. State, 308 U. S. 147, 160; De Jonge v. Oregon, 299 U. S. 353, 364; Grosjean v. American Press Co., 297 U. S. 233, 243; Near v. Minnesota, 283 U. S. 697, 707; Stromberg v. California, 283 U. S. 359, 368; Whitney v. California, 274 U. S. 357, 362, 371, 373; Gitlow v. New York, 268 U. S. 652, 666.

Appellant here pitches his argument on the due process clause of the Fourteenth Amendment.

Freedom of worship is similarly sheltered. *Cantwell* v. *Connecticut*, 310 U. S. 296, 303.

Appellant assails the statute as a violation of all three freedoms, speech, press and worship, but only an attack on the basis of free speech is warranted. The spoken, not the written, word is involved. And we cannot conceive that cursing a public officer is the exercise of religion in any sense of the term. But even if the activities of the appellant which preceded the incident could be viewed as religious in character, and therefore entitled to the protection of the Fourteenth Amendment, they would not cloak him with immunity from the legal consequences for concomitant acts committed in violation of a valid criminal statute. We turn, therefore, to an examination of the statute itself.

Allowing the broadest scope to the language and purpose of the Fourteenth Amendment, it is well understood that the right of free speech is not absolute at all times and under all circumstances.[2] There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which has never been thought to raise any Constitutional problem.[3] These include the lewd and obscene, the profane, the libelous, and the insulting or "fighting" words—those which by their very utterance inflict injury or tend to incite an immediate breach of the peace.[4] It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.[5] "Resort to epithets or personal abuse is not in any proper sense communication of information or opinion safeguarded by the Constitution, and its punishment as a criminal act would raise no question under that instrument." *Cantwell* v. *Connecticut*, 310 U. S. 296, 309-310.

The state statute here challenged comes to us authoritatively construed by the highest court of New Hampshire. It has two provisions—the first relates to words or names addressed to another

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[2] Schenck v. United States, 249 U. S. 47; Whitney v. California, 274 U. S. 357, 373 (Brandeis, J., concurring); Stromberg v. California, 283 U. S. 359; Near v. Minnesota, 283 U. S. 697; De Jonge v. Oregon, 299 U. S. 353; Herndon v. Lowry, 301 U. S. 242; Cantwell v. Connecticut, 310 U. S. 296.

[3] The protection of the First Amendment, mirrored in the Fourteenth, is not limited to the Blackstonian idea that freedom of the press means only freedom from restraint prior to publication. Near v. Minnesota, 283 U. S. 697, 714-715.

[4] Chafee, Free Speech in the United States (1941), 149.

[5] Chafee, *op. cit.*, 150.

in a public place; the second refers to noises and exclamations. The court said: "The two provisions are distinct. One may stand separately from the other. Assuming, without holding, that the second were unconstitutional, the first could stand if constitutional." We accept that construction of severability and limit our consideration to the first provision of the statute.[6]

On the authority of its earlier decisions, the state court declared that the statute's purpose was to preserve the public peace, no words being "forbidden except such as have a direct tendency to cause acts of violence by the persons to whom, individually, the remark is addressed".[7] It was further said: "The word 'offensive' is not to be defined in terms of what a particular addressee thinks. . . . The test is what men of common intelligence would understand would be words likely to cause an average addressee to fight. . . . The English language has a number of words and expressions which by general consent are 'fighting words' when said without the disarming smile. . . . Such words, as ordinary men know, are likely to cause a fight. So are threatening, profane or obscene revilings. Derisive and annoying words can be taken as coming within the purview of the statute as heretofore interpreted only when they have this characteristic of plainly tending to excite the addressee to a breach of the peace. . . . The statute, as construed, does no more than prohibit the face-to-face words plainly likely to cause a breach of the peace by the addressee, words whose speaking constitute a breach of the peace by the speaker—including 'classical fighting words', words in current use less 'classical' but equally likely to cause violence, and other disorderly words, including profanity, obscenity and threats."

We are unable to say that the limited scope of the statute as thus construed contravenes the Constitutional right of free expression. It is a statute narrowly drawn and limited to define and punish specific conduct lying within the domain of state power, the use in a public place of words likely to cause a breach of the peace. Cf. *Cantwell* v. *Connecticut*, 310 U. S. 296, 311; *Thornhill* v. *Alabama*, 310 U. S. 88, 105. This conclusion necessarily disposes of appellant's contention that the statute is so vague and indefinite as to render a conviction thereunder a violation of due process. A statute

[6] Since the complaint charged appellant only with violating the first provision of the statute, the problem of Stromberg v. California, 283 U. S. 359, is not present.

[7] State v. Brown, 68 N. H. 200; State v. McConnell, 70 N. H. 294.

punishing verbal acts, carefully drawn so as not unduly to impair liberty of expression, is not too vague for a criminal law. Cf. *Fox* v. *Washington*, 236 U. S. 273, 277.[8]

Nor can we say that the application of the statute to the facts disclosed by the record substantially or unreasonably impinges upon the privilege of free speech. Argument is unnecessary to demonstrate that the appellations "damn racketeer" and "damn Fascist" are epithets likely to provoke the average person to retaliation, and thereby cause a breach of the peace.

The refusal of the state court to admit evidence of provocation and evidence bearing on the truth or falsity of the utterances is open to no Constitutional objection. Whether the facts sought to be proved by such evidence constitute a defense to the charge or may be shown in mitigation are questions for the state court to determine. Our function is fulfilled by a determination that the challenged statute, on its face and as applied, does not contravene the Fourteenth Amendment.

Affirmed.

A true copy.

Test:

Clerk, Supreme Court, U. S.

[8] We do not have here the problem of Lanzetta v. New Jersey, 306 U. S. 451. Even if the interpretative gloss placed on the statute by the court below be disregarded, the statute had been previously construed as intended to preserve the public peace by punishing conduct, the direct tendency of which was to provoke the person against whom it was directed to acts of violence. State v. Brown, 68 N. H. 200 (1894).

Appellant need not therefore have been a prophet to understand what the statute condemned. Cf. Herndon v. Lowry, 301 U. S. 242. See Nash v. United States, 229 U. S. 373, 377.